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Supreme Court, U.S.
FILED
No. 07-1427 MAY 15 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., A HAWAII CORPORATION, AND K.M.B.S., INC., A HAWAII CORPORATION D/B/A KAANAPALI TOURS, PETITIONERS

v.

ALLAN A. SMITH, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND NATURAL RESOURCES, STATE OF HAWAII; STEPHEN THOMPSON; AND ED UNDERWOOD, ADMINISTRATOR OF THE DIVISION OF BOATING AND OCEAN RECREATION, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Hawaii's five-month seasonal ban on parasailing in navigable (federal) waters off Maui's coast violate the Supremacy Clause because it furthers neither the purposes nor the objectives of the federal Marine Mammal Protection Act, 16 U.S.C. § 1379(a), the predominant federal regime enacted by Congress in 1972 for the safety and well being of humpback whales?

2. Does the enactment of legislation mooting a judgment which granted all of the relief sought, including a permanent injunction, deprive the prevailing party, here petitioners, of the right to attorney's fees under 42 U.S.C. § 1988?

RULE 29.6

The petitioners UFO Chuting of Hawaii, Inc. and K.M.B.S., Inc. d/b/a Kaanapali Tours are privately held corporations and hereby state that they have no parent company and that no public company or entity owns 10% or more of their stock.

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The published opinion of the United States Court of Appeals for the Ninth Circuit in *UFO Chuting of Hawaii, Inc. et al. v. Allan A. Smith et al.*, C.A. No. 05-16545, decided November 28, 2007, and reported at 508 F.3d 1189(9th Cir. 2007), affirming the order of the District Court granting summary judgment in favor of the State respondents and refusing to award the petitioners their attorney's fees as the prevailing party, is set forth in the Appendix hereto(App. 1-19).

The unpublished amended order of the District Court for the District of Hawaii in *UFO Chuting of Hawaii, Inc. et al. v. Peter T. Young et al.*, Docket No. 03-00651, filed on May 5, 2005, granting the respondents' motion for relief from judgment, is set forth in the Appendix hereto(App. 20-38).

The published Order of the District Court for the District of Hawaii in *UFO Chuting of Hawaii, Inc. et al. v. Paul T. Young et al.*, Docket No. 03-00651, filed on July 7, 2005, and reported at 380 F. Supp. 2d 1160(D. Haw. 2007), granting the respondents' renewed motion for summary judgment, is set forth in the Appendix hereto(App. 30-49).

The unpublished Order of the District Court for the District of Hawaii in *UFO Chuting of Hawaii, Inc. et al. v. Allan A. Smith et al.*, Docket No. 03-00651, filed on July 7, 2005, affirming the Magistrate's recommendation that petitioners' amended motion for attorney's fees be denied, is set forth in the Appendix hereto(App. 50-56).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *UFO Chuting of Hawaii, Inc. et al. v. Allan A. Smith et al.*, C.A. No. 05-16545, denying the petitioners' petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 57).

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court granting summary judgment in favor of the State respondents and refusing to award the petitioners their attorney's fees as the prevailing party was filed on November 28, 2007; and its further order denying the petitioners' timely filed petition for rehearing *en banc* was filed and decided on February 11, 2008(App. 1-19;57).

This petition for writ of certiorari is filed within ninety (90) days of February 11, 2008. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article VI, Paragraph 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Article I, § 8:

> The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States....

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

16 U.S.C. § 1361 [The Marine Mammal Protection Act]:

> The Congress finds that---
> **(1)** certain species and population stocks of marine mammals are, or may be, in danger of extinction, or depletion as a result man's activities;
> **(2)** such species and population stocks should not be permitted to diminish beyond the point at which they cease to be significant functioning element of the ecosystem...
> ....
> **(5)** marine mammals and marine mammal products either—
>
> > **(A)** move in interstate commerce, or
> > **(B)** affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce, and that the production and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce....

16 U.S.C. § 1362(13):

> The term "take' means to harass, hunt, capture, or kill, attempt to harass, hunt, capture, or kill any marine mammal.

16 U.S.C. § 1362(18)(A):

> The term "harassment" means any act of pursuit, torment, or annoyance which—
>
> (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
>
> (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding,, or sheltering....

16 U.S.C. § 1379(a):

> **State enforcement of State laws or regulations prohibited without transfer to State of management authority by Secretary**
>
> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species...of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species ...to the State under subsection (b)(1) of this section.

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
> ...
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of section...1983...of this title..., the court, in its discretion, may allow the prevailing party... a reasonable attorney's fee as part of costs....

Haw. Rev. Stat. § 200-37(i):

> Between December 15 and May 15 of each year, no person shall operate a thrill craft, or engage in parasailing, water sledding, or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui as provided in section 200-38.

Haw. Rev. Stat. § 200-38(c):

> Notwithstanding any other law to the contrary, no person shall operate a thrill craft, engage in parasailing, operate a motorized vessel towing a person engaged in parasailing, engage in commercial water sledding or commercial high speed boating, or operate a commercial motor vessel towing a person engaged water sledding between December 15 and May 15 of each year in the waters of west and south Maui from Pu'u Ola'i to Hawea Point.

Fiscal Year 2005 Omnibus Appropriations Bill [Pub. L. No. 108-447, § 213, 118 Stat. 2809(2004)]:

> [N]otwithstanding any other Federal law related to the conservation and management of marine

mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

STATEMENT

Since 1985, the petitioner UFO Chuting of Hawaii, Inc.("the petitioner") operates a parasailing business in the coastal, navigable waters off the southwest coast of Maui between Lahaina and Kaanapali. It does so with permits issued by the Hawaii Department of Transportation and, after 1993, by the Hawaii Department of Land and Natural Resources. In 1991, the petitioner K.M.B.S., Inc. d/b/a Kaanapali Tours ("the petitioner") began similar parasailing operations in these same waters.

The petitioners use tow boats which are designed, constructed and equipped for the sole purpose of towing their parasailing passengers. Each of their boats measures 28 feet in length and is powered by a freshwater-cooled diesel engine driving a set of counter-rotating propellers, a drive train which allows the vessels to achieve operating speed with less underwater disruption than vessels with a single propeller. In order to conduct parasailing safely, each of the petitioners' tow boats is equipped with an hydraulic winch system which brings the parasailing passenger down safely as the tow boat decreases speed. The tow boats when parasailing reach a speed of less than fifteen (15) nautical miles per hour 70-80% of the time and then exceed twenty (20)

knots for no more than a few minutes each run while turning downwind.

Designed specially for towing a parasail aloft instead of passenger comfort, the petitioners' tow boats are unsuited for other forms of commercial activity such as whale watching, open ocean excursions, snorkeling or sport fishing. Passengers sit in the forward one-third of the vessel unprotected from the elements and subject to the greatest vertical motion while the vessel is underway; their small size make them unsuitable for any other kind of open-ocean sports activity.

Besides having permits from the Hawaii Department of Land and Natural Resources, each of the petitioners' tow boats is inspected and licensed by the U.S. Coast Guard to carry up to twelve passengers in the "coastwise" trade of parasailing between McGregor Point and Lipoa Point on the western coast of Maui, an area of about fifteen (15) square miles. Since 1992, a part of these coastal waters has been designated by the Secretary of Commerce under authority conferred by 16 U.S.C. §§ 1431 *et seq.* as "protected" waters for humpback whales, the so-called Hawaiian Islands Humpback Whale National Marine Sanctuary.

In setting out these coastal waters off southwestern Maui as a sanctuary for humpback whales, the Secretary of Commerce was exercising the power delegated him (and the Secretary of the Interior as well) by Congress in 1972 in The Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.* ("MMPA"). There Congress expressly found that the population stocks of marine mammals such as humpback whales were declining, that their habitats need protection and that the Secretary

should take all necessary steps to preserve their status as a functioning part of the ecosystem. 16 U.S.C. §1361(1) & (2). Congress also explicitly determined in this comprehensive federal legislation that these marine mammals "move in interstate commerce" and that "the production and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those [animal] products which move in interstate commerce...." *Id.* at (5).

In furtherance of this *federal* scheme to protect marine mammals whenever they appear within our national, navigable waters, Congress also provided that

> [n]o State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species...of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species ...to the State under subsection (b)(1) of this section.

16 U.S.C. § 1379(a). In this regard "taking" means to harass, hunt, capture, or kill, attempt to harass, hunt, capture, or kill any marine mammal, 16 U.S.C. § 1362(13); and to "harass" means to "disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding,, or sheltering."16 U.S.C. § 1362(18)(A)(ii).

Incident to its federal stewardship of the Hawaiian Islands Humpback Whale National Marine Sanctuary, the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce in 1999

promulgated regulations which *inter alia* regulate activity within the Sanctuary in order "to maintain, restore, and enhance the humpback whale and its habitat, to provide a place for humpback whales that are dependent on their Hawaiian Islands wintering habitat for reproductive activities, including breeding, calving, and nursing, and for the long-term survival of their species...."15 CFR § 922.180(2003).

NOAA regulations in relevant part (15 CFR § 922.183) allow "all activities" to be undertaken within the Sanctuary except those prohibited by § 922.184 and that section prohibits "approaching, or causing a vessel or other object to approach, within the Sanctuary, by any means, within 100 yards of any humpback whale...." Moreover, the civil penalty provisions of 16 U.S.C.§ 1437(d), impose a fine of not more than $100,000 upon anyone found violating this regulation; and the offending vessel may be forfeited as well. See 16 U.S.C.§ 1437(e).

Otherwise, the federal regulations permit the petitioners to operate their vessels in the manner and to the extent allowed by their federal licenses, i.e., to carry up to twelve passengers in its "coastwise" trade of parasailing between McGregor Point and Lipoa Point on the western coast of Maui, subject only to reasonable state regulation based upon the peculiarities of local navigation. The federal regulatory regime contains no seasonal ban on parasailing in the waters off Maui.

The petitioners operate their parasailing business in a manner which conscientiously reflects the "federal approach rule" of 100 yards contained within the MMPA and its regulations Their tow boats are always manned by an experienced U.S. Coast Guard-licensed captain

together with an unlicensed mate who serves as an observer whenever a parasail is aloft. The petitioners train their captains to give wide berth to any whale which may be sighted while parasailing; and they will suspend operations whenever conditions create the risk of approaching closer than 500 yards to any humpback whale. In addition, the petitioners' captains monitor marine radio frequencies used by tour boats engaged in whale watching in the area, a reliable source of information to track the location, number and movement of humpback whales.

If a whale is ever seen approaching a tow boat, the captain will discontinue parasailing and come to a complete stop and remain stopped, if necessary, in order to stay at least 100 yards from the whale(s). During this stop, the mechanical winch retrieves the parasail (and its passenger) at a rate which allows it to remain inflated, a protocol which has prevented any collision with a humpback whale.

Despite the express provisions of 16 U.S.C. § 1379(a), which preempt any State laws relating to the taking of marine mammals including humpback whales, except when there is a transfer of authority by the Secretary to the State under § 1379(b)(there was none here), the State of Hawaii enacted its own statutory and regulatory scheme which *inter alia* banned all parasailing for five months of the year from December 15 through May 15 in the navigable coastal waters between Lahaina and Kaanapali.

Specifically, Haw. Rev. Stat. § 200-37(i) provides that during this time "no person shall operate a thrill craft, or engage in parasailing, water sledding, or

commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui as provided in section 200-38." Haw. Rev. Stat. §200-38(c) then provides that no person shall engage in parasailing between December 15 and May 15 of each year in the waters of west and south Maui from Pu'u Ola'i to Hawea Point. *See also* Haw. Adm. R.§§ 13-250-5;13-256-112(regulations enforcing the parasailing ban).

In the face of these conflicting statutory and regulatory laws proscribing their right to operate their vessels in the navigable waters off the southwest coast of Maui, the petitioners in November, 2003 brought suit under 42 U.S.C. § 1983, in the district court against the State actors charged with enforcing the seasonal parasailing ban ("the respondents" or "the State"). In their amended complaint, they first claimed that the federal government had articulated its own 100-yard rule for approaching humpback whales and thereby occupied the field for regulating the conduct of vessels in proximity to humpback whales within the Sanctuary; and that Hawaii's attempt to regulate this same conduct runs afoul of the Supremacy Clause of the federal constitution, interferes with the "coastwise" purposes for which their vessels were designed, constructed and licensed by the U.S. Coast Guard, and was therefore preempted. They also contended that the seasonal ban violates the dormant commerce clause of the federal constitution. The petitioners sought declaratory relief to this effect and injunctive relief enjoining enforcement of the seasonal parasailing prohibition.

On July 9, 2004, the district court, Mollway, J., granted the petitioners' motion for summary judgment

and denied the respondents' motion for the same relief. *UFO Chuting of Hawaii, Inc. v. Young et al.*, 327 F. Supp.2d 1220(D. Haw. 2004). It determined that both the express terms and the legislative history of the MMPA establish that this federal statutory scheme was intended to preempt all State laws relating to the taking of marine mammals except when there are transfers of authority consistent with its own provisions. *Id.* at 1225. It concluded that "Congress envisioned cooperation by the states with the federal government; Congress did not lave the states free to act independent of the federal government." *Id.* at 1225. Moreover,

> the legislative history indicates that a state wishing to enact laws relating to the taking pf marine mammals, such as the Hawaii parasailing law, *must seek approval from or cooperate with the* federal government. The MMPA does not allow states to implement such laws independent of the federal government.

Id. at 1228-1229(emphasis supplied). The district court then granted the petitioners' motion for a permanent injunction barring enforcement of Hawaii's seasonal parasailing ban(App. 3). The State appealed(App. 3).

On December 8, 2004, subsequent to Judge Mollway's decision and while the State's appeal from the permanent injunction was pending, the 2005 Fiscal Year Omnibus Appropriations Bill, Pub. L. No. 108-447, 118 Stat. 2809, was signed into law(App. 3). Section 213 of this bill provides:

> [N]otwithstanding any other Federal law related to the conservation and management of marine

> mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

(App. 3-4).

On December 13, 2004, the respondents moved for a stay of the injunction arguing that this new legislation altered the legal landscape of the district judge's earlier ruling(App. 4;23). The respondents also asked the district court to state whether it was willing to reconsider its previous order granting the petitioners a permanent injunction in light of this new legislation if and when the court of appeals remanded the respondents' appeal for this purpose(App. 23). Judge Mollway thereafter granted the respondents' motion for a stay and, without ruling on the merits, indicated her willingness to reconsider her previous order granting the permanent injunction in the petitioners' favor(App. 23).

After the court of appeals remanded the case to the district court, Judge Mollway in an amended order on May 5, 2005, granted the respondents' motion for relief from judgement(App. 4;20-38). The district judge ruled that Section 213 of the 2005 Fiscal Year Omnibus Appropriations Bill, if constitutional, would resolve any conflict between the MMPA and Haw. Rev. Stat. § 200-37(i), the Hawaii statute implementing the seasonal parasailing ban (App. 25).

As the district judge ruled, "[t]his court earlier held that the Hawaii law conflicted with federal law, as the MMPA allowed individuals to approach of 100 yards of marine mammals, while Hawaiian regulations required staying 300 yards from marine mammals"(App. 25). Yet "Section 213 expressly allows the State of Hawaii to enact regulations that are more restrictive than federal law, thus curing any direct conflict"(App. 25). The district judge therefore concluded that MMPA's preemptive effect was altered by the new legislation(App. 29-31).

Turning to the petitioners' claim that Section 213 of the 2005 Fiscal Year Omnibus Appropriations Bill violates their right to the equal protection of the laws, the district judge applied a highly deferential rational basis review of the legislation, i.e., the statute is presumed constitutional and the burden was on the petitioners "to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record"(App. 32 quoting *Heller v. Doe*, 509 U.S. 312, 321(1993)). It ruled that the statute as a whole satisfies this rational basis review(App. 33-35). As it concluded, it was not irrational for the federal government to permit State regulations that protect marine mammals to exceed federal regulations promulgated by NOAA, reasoning "Congress may and sometimes does permit States to enact more stringent environmental regulations than the federal government"(App. 35).

With this ruling as a foundation, the district court granted the respondents' renewed motion for summary judgment on July 7, 2005(App. 39-49). In reaching this result, Judge Mollway *inter alia* rejected the petitioners' claims that the parasailing ban for five months of the year unreasonably impinged upon their "coastwise" right of

navigation under their vessels' federal licenses(App. 45-46). As she concluded, the federal licensing of the petitioners' boats for "coastwise" trade does not give it a federally created right to operate a parasailing business and she surmised that the petitioners "may engage in coastwise trade other than parasailing...in those waters"(App. 46-47).

In the wake of this ruling, the district judge on the same day (July 7, 2005) affirmed the Magistrate's recommendation that the petitioners' amended motion for attorney's fees be denied (App. 50-56). It reasoned that the petitioners never received a benefit from the permanent injunction entered by the district court on July 9, 2004, and therefore were never the "prevailing party[s]" entitled to their attorney's fees under 42 U.S.C. § 1988(App. 52-55).

The petitioners appealed and on November 28, 2007, the Court of Appeals for the Ninth Circuit unanimously affirmed these rulings by the district court(App. 1-19). It rejected the argument that the State of Hawaii could not ban the operation of the petitioners' boats for the only purpose for which they were federally licensed; it concluded that the ban did not actually conflict with federal law; and it reasoned that the parasailing ban is a "reasonable regulation of federal licenses"(App. 8-9).

In reaching this last conclusion, the court of appeals adopted an extremely deferential level of review in finding that the seasonal parasailing ban was a "reasonable" regulation of the petitioners' federal boat licenses(App. 8-10). That is, instead of imposing upon the State respondents the burden of showing that the parasailing ban sweeps no further than necessary in

order to achieve its putative purpose, especially as here with the MMPA where there is a history of "significant federal presence," as this Court required in *United States v. Locke*, 529 U.S. 89(2000), the court of appeals imposed *upon the petitioners* the impossible burden of negating every conceivable reason the State of Hawaii may have had in enacting the parasailing ban(App. 9-10).

Conceiving of several good reasons to justify Hawaii's seasonal prohibition in excess of the federal regulation, the court of appeals concluded that "[b]ecause the parasailing ban furthers the legitimate governmental purpose of protecting humpback whales, we hold that the statute [Haw. Rev. Stat. § 200-37(i)] is reasonable" and nondiscriminatory(App. 11-13). Finally, the court of appeals determined that the district court did not abuse its discretion in denying the petitioners an award of their attorney's fees(App. 13-16).

On February 11, 2008, the court of appeals denied the petitioners' timely filed petition for rehearing *en banc*(App. 57). The petitioners now respectfully bring this petition to the Court seeking a writ of certiorari to the Court of Appeals for the Ninth Circuit.

REASONS FOR GRANTING THE PETITION

1. Hawaii's Seasonal Parasailing Ban In Federal Navigable Waters Violates the Supremacy Clause And The Decision Below Nullifies *United States v. Locke*, 529 U.S. 89 (2000) By Using A Test Which Wrongly Ignored The Federal Government's Predominant Regulation in The Area And Unfairly Forced The Petitioners To Negate Any Conceivable Reason For The Absolute Five-Month Ban.

The Supremacy Clause of Art. VI of the Constitution gives Congress the power to preempt state law with appropriate legislation. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368(1986). Because the States are independent sovereigns in our federal system, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485(1996), state laws are not preempted unless preemption is "the clear and manifest purpose of Congress."*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230(1947). *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 85-88(2006). Thus Congressional intent is the "ultimate touchstone" in any preemption analysis If preemption is found, the state law requirements touching on the controversy are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746(1981) citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)316, 427 (1819). *See Reed v. Medtronic, Inc.*, ___U.S.___, 128 S.Ct. 999(2008).

This Court has identified six situations where it can be reasonably inferred that Congress intended to preempt state statutory or regulatory law touching on a given controversy: (1) where Congress in enacting a federal statute is explicit in its intent to reserve federal

supremacy over the subject matter and preempt state law, *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31(1996); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 530-531(1977); (2) when there is an outright or actual conflict between the federal and state law, even when Congress says nothing about it, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132. 143(1963); (3) where the conflict between federal and state law makes it physically impossible to comply with both sets of regulation, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-373(2000); (4) when the federal law implicitly carries with it a barrier to state regulation, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96(1983); (5) where the federal regulatory scheme is so pervasive and the federal interest so dominant that there is no room for state law regulation, *Rice v. Santa Fe Elevator Corp.*, *supra*; and (6) when the state law prevents the accomplishment of the objectives which Congress seeks in enacting the federal statute. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 220-221(1983. *Hines v. Davidowitz*, 312 U.S.52, 66-67(1941).

When it enacted the MMPA in 1972, Congress expressly laid out a pervasive role for the federal government acting through the Secretary of Commerce or the Secretary of the Interior in administering the Act's provisions in order to protect the population stocks of all marine mammals, including humpback whales. On several scores, the Act expressly and implicitly gives either Secretary the unquestioned preemptive power over any state law or regulation to the contrary.

To make MMPA's preemptive reach over State regulation more clear, Congress made the express finding (in 16 U.S.C. § 1361(5)) that marine mammals "move in

interstate commerce" or affect the balance of marine ecosystems "which is important to other animals and animal products which move in interstate commerce." Confirming this exclusive federal dominion over the health and well being of humpback whales and other marine mammals, 16 U.S.C. § 1379(a), explicitly provides that

> [n]o State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species...of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species...to the State under subsection (b)(1) of this section.

Thus on two certain grounds Congress has staked out a preemptive federal presence to the complete exclusion of the States in the area of the health and well being of marine mammals moving in interstate commerce: (1) by the express provisions of the MMPA providing that no State may enforce or attempt to enforce any State law or regulation which relate to this subject (without first going through a federal approval process), *Barnett Bank, N.A. v. Nelson, supra*; *McCulloch v. Maryland, supra*; compare *Manchester v. Massachusetts*, 139 U.S. at 266(1891); and (2) by enacting a pervasive statutory and regulatory scheme which is tantamount to a complete federal occupation of the field, implicitly preempting any State or local regulation inconsistent therewith pursuant to the Supremacy Clause. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300(1988). *U.S. v. Allegheny County*, 322 U.S. 174, 183(1944).

In *United States v. Locke*, 529 U.S. 89, 106-109(2000), this Court considered whether rules and regulations promulgated by the State of Washington's Office of Marine Safety in the wake of the Exxon Valdez oil spill for preventing spills, for oil tanker design, for reporting etc. were preempted by federal rules and regulations on the same subject. *Id.* at 97. In concluding that the state regulations were preempted and invalid, the Court, speaking through Mr. Justice Kennedy, held that where the field sought to be regulated by the State has a "history of significant federal presence,"

> there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. *Rather, we must ask whether the local laws in question are consistent with the federal regulatory structure, which has as on of its objectives a uniformity of regulation for maritime commerce.* No artificial presumption aids us in determining the scope of appropriate local regulation under the [federal statutory and regulatory regime].

Id. at 108-109 citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525(1977). (emphasis supplied).

Because the State of Washington enacted legislation in an area where the federal interest has been manifest and predominant since the beginning of the Republic, i.e., interstate and international navigation and commerce, the *Locke* Court imposed a higher level of scrutiny on the State's rules and regulations—unaided by any assumption that it was a valid exercise of its police power— and found them to be invalid and preempted by the existence of a federal regulatory regime touching on

the same subjects. *Id.* at 99; 112-115. "The appropriate inquiry...[is] whether the purposes and objectives of the federal statutes, including an intent to establish a workable, uniform system are consistent with concurrent state regulation." *Id.* at 115 quoting *Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604(1915)(Holmes, J.)("When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").

So too in this case, the dominant federal presence in this area of regulation is anchored by fundamental facts: (1) since at least *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 212(1824), the federal government under the Commerce Clause (Art. I, § 8, cl. 3 of the Constitution) has dominion, to the exclusion of the States, over navigable waters of the United States, *City of Tacoma v. Taxpayers*, 357 U.S. 320, 334(1958); (2) the objects of regulation, marine mammals, maintain their habitat in navigable waters where the federal interest is paramount and self-evident since the beginning of the Republic; and (3) marine mammals travel in interstate commerce and affect ecosystems which contain animals and products which do likewise, prompting a unique federal concern founded on the Commerce Clause and interstate activity for the health and well being of the population stocks of all marine mammals. *Gonzales v. Raich*, 545 U.S. 1, 29(2005). *See* 16 U.S.C. § 1361(5).

Given this significant federal presence in interstate and international navigation, interstate commerce and in the well being of marine mammals traveling in navigable waters throughout the Nation, *Locke* teaches that there is

no beginning "assumption" that concurrent regulation by the State is a valid exercise of its police powers. Instead, the inquiry begins with the assumption that the federal presence over the management and preservation of humpback whales in navigable waters is dominant and justified; that the State regulation----unaided by any assumptions about its validity ---- deserves a higher level of scrutiny; and the inquiry then is whether the purposes and objectives of the federal regulatory scheme, including an intent to establish a workable, uniform system, are consistent with concurrent state regulation. *Locke*, 529 U.S. at 115.. See *Gibbons v. Ogden, supra*. If they are not consistent, the state regulations must give way to the dominant federal regime. *Locke*, 529 U.S. at 112-115.

The court of appeals' analysis turns these principles on their head and nullifies *Locke*. Instead of acknowledging the dominant federal presence in this area of regulation and then eschewing any assumption about the validity of Hawaii's parasailing ban while giving it a higher level of scrutiny, it adopted an extremely deferential review of the ban, finding without analysis that it was a "reasonable" regulation(App. 8-10). Moreover, it failed to ask whether the purposes and objectives of the federal regulatory scheme, including its intent to have a workable, unified system free of redundant regulation by the States, were consistent with the State's parasailing ban.

Finally, instead of imposing upon the State the burden of showing that its parasailing ban is not inconsistent with the federal regulations and sweeps no further than necessary in order to achieve its putative purpose of protecting humpback whales (a showing which the State could not make on this record), the court of

appeals imposed *upon the petitioners* the impossible burden of negating every conceivable reason the State might have had in enacting its parasailing ban(App. 9-10). In this way, the court of appeals has nullified *Locke*, diluted the force of the federal regulatory regime surrounding marine mammals and given the State the unearned power to legislate in violation of the Supremacy Clause. There is no basis in this Court's decisions for inferring, as the court of appeals had done here, that the State's ban on parasailing in navigable waters involved a field traditionally occupied by the States, that it then should be *presumed* reasonable, giving undue deference to the State's regulation, thereby shifting the burden of proof to the petitioners to negate any conceivably legitimate reason for the parasailing ban.

The overly deferential treatment given the parasailing ban by the court of appeals also infected the way it decided whether the State was imposing reasonable, nondiscriminatory measures upon the petitioners as holders of federal boat licenses. Such licenses confer upon the licensee a right to operate freely in each state's waters, subject only to legitimate exercises of the state's police power, i.e., reasonable, nondiscriminatory conservation and environmental protection measures. *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 277;281(1977). *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-446(1960)("*Evenhanded* local regulations to effectuate a legitimate local public interest is valid unless preempted by federal action.")(emphasis supplied). *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142-143(1970).

This deference prevented any vigorous inquiry by the court of appeals which should have scrutinized how an *outright ban* on parasailing was reasonable instead of

imposing less drastic measures such as lower speed limits or reducing the petitioners' hours of operation. Moreover, the ban carries with it the legislative conclusion—never proven—that parasailing between December 15 and May 15 can *never* occur without endangering humpback whales in their habitat, no matter how assiduously the petitioners operate their vessels in conformance with state and federal restrictions. This is a total prohibition, not rational regulation; it irrationally assumes a causal nexus between parasailing and the well being of the humpback whales.

Finally, by shifting to the petitioners the impossible burden of negating every conceivable reason the State might have had in enacting its parasailing ban in order to prevail, the court of appeals unfairly and in violation of *Locke* endowed the State's parasailing ban with a presumption of constitutionality it does not deserve under the Supremacy Clause and unfairly skewed the burden of proof to the petitioners' detriment and in violation of their due process rights to a fair hearing. *See Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970) citing *ICC v. Louisville & N. R. Co.*, 227 U.S. 88,93-94(1913) and *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 103-104(1963); *See also Leary v. United States*, 395 U.S. 6, 32-33(1969).

2. Unforeseen Legislation By Congress Which Changes The Legal Landscape And Moots An Earlier Judgment Giving The Petitioners A Victory Against The Respondents In The Form Of A Permanent Injunction Does Not Deprive The Petitioners Of An Award Of Their Attorney's Fees As The "Prevailing Party."

On July 9, 2004, the district court granted the petitioners' a permanent injunction barring enforcement of Hawaii's seasonal parasailing ban(App. 3). The State appealed(App. 3). On December 8, 2004, while the permanent injunction was pending, the 2005 Fiscal Year Omnibus Appropriations Bill was signed into law. It ostensibly gave the State the power to enforce the parasailing ban and apparently mooted this controversy (if the Supremacy Clause would otherwise permit the State's parasailing ban).

On December 13, 2004, the respondents moved for a stay of the injunction arguing that this new legislation altered the legal landscape of the district judge's earlier ruling(App. 4;23). The respondents also asked the district court to state whether it was willing to reconsider its previous order granting the petitioners a permanent injunction in light of this new legislation if and when the court of appeals remanded the respondents' appeal for this purpose(App. 23). On remand, Judge Mollway granted the respondents' motion for a stay and, without ruling on the merits, indicated her willingness to reconsider her previous order granting the permanent injunction in the petitioners' favor(App. 23).

After the court of appeals remanded the case to the district court, Judge Mollway in an amended order on

May 5, 2005, granted the respondents' motion for relief from judgement(App. 4;20-38). The district judge ruled that Section 213 of the 2005 Fiscal Year Omnibus Appropriations Bill, if constitutional, would resolve any conflict between the MMPA and Haw. Rev. Stat. § 200-37(i), the statute implementing the seasonal parasailing ban(App. 25). The petitioners' were thereafter denied their attorney's fees when the district judge ruled that the petitioners never received a benefit from the permanent injunction entered by the district court on July 9, 2004, and therefore were never the "prevailing part[ies]" entitled to attorney's fees under 42 U.S.C. § 1988(App. 52-55).

None of these factors disqualified the petitioners from the recovery of attorney's fees under § 1988. In the first place, to be the prevailing party and therefore entitled to attorney's fees under the "generous formulation" of this Court, the parties seeking such relief must show that they "succeed[ed] on *any* significant issue in litigation which achieves *some of the benefit* the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109(1992) quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433(1983)(emphasis supplied). Indeed, even the recovery of *one dollar* is sufficient to find the applicant a prevailing party. *Farrar v. Hobby*, 506 U.S. at 109-110.

Second, the plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt v. Helms*, 482 U.S. 755, 760(1987); and whatever relief the plaintiff secures must directly benefit her *at the time of the judgment or settlement. Id.* at 764.Otherwise, the judgment or settlement cannot be said to "[a]ffect the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4(1988)(*per*

curiam). In addition, this Court has held that a plaintiff who wins a preliminary or permanent injunction against the defendant has "prevailed on the merits of at least some of [their] claims." *Hanrahan v. Hampton*, 446 U.S. 754, 757-758(1980)(*per curiam*).

Applying these principles, lower federal courts have consistently held that where a permanent injunction enters in favor of a civil rights plaintiff but while on appeal an intervening event such as a change in the law through legislation, executive order and the like, moots the controversy by changing the legal landscape affecting the parties, the plaintiffs still are entitled to their attorney's fees under § 1988. *Watson v. County of Riverside*, 300 F. 3d 1092, 1095(9th Cir. 2002). Balark v. City of Chicago, 81 F.3d 658, 663-665(7th Cir. 1996). *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 600-601(1st Cir. 1982)(Breyer, J.). *Hyundai Motor America v. J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915917-918(E.D. La. 1991). See *Gerling Global Reinsurance v. Garamendi*, 400 F. 3d 803, 810(9th Cir. 2005).

As then Circuit Judge Breyer noted in *Coalition for Basic Human Needs*,

> Of course, an intervening event may have made it unnecessary or impossible for the defendant to deliver that to which the plaintiff is legally entitled. The plaintiff may have won the right to readmission to a particular school, for example, but the school may burn down or the plaintiff may die. Alternatively, the school board might have readmitted the plaintiff after entry of a final judgment for a totally independent reason,

> demonstrably unrelated to the lawsuit. But *there is no reason why these sorts of fortuitous occurrences ought, in and of themselves, to deprive lawyers who win a civil rights suit of the feesto which they otherwise would be entitled.* In ordinary English usage, they have still "prevailed" in the case. No statutory purpose would be served by turning an award of fees upon the presence or absence of such fortuitous post-judgment circumstances.

691 F.2d at 600(emphasis supplied).

If "[l]iability on the merits and responsibility for fees go hand in hand," *Kentucky v. Graham*, 473 U.S. 159, 165(1985), then the petitioners are entitled as a matter of law to the payment of their attorney's fees by the State respondents. The petitioners prevailed on their claim for declaratory and injunctive relief on account of the State's violation of the Supremacy Clause. No more was required to trigger an entitlement to attorney's fees under § 1988.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the District of Hawaii, with instructions that a new judgment enter declaring that Haw. Rev. Stat. § 200-37(i) violates the Supremacy Clause, awarding the petitioners their attorney's fees under 42 U.S.C. § 1988, and providing the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 05-16545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UFO CHUTING OF HAWAII, INC., a Hawaii corporation; K.M.B.S., INC., a Hawaii corporation d/b/a Kaanapali Tours,
Plaintiffs-Appellants,

v.

ALLAN A. SMITH, in his capacity as Chair of the Board of Land and Natural Resources, State of Hawaii, and Acting Director of the Department of Land and Natural Resources, State of Hawaii; STEPHEN THOMPSON; ED UNDERWOOD, in his capacity as Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii, *
Defendants-Appellees,

UNITED STATES DEPARTMENT OF COMMERCE; NATIONAL MARINE FISHERIES SERVICE,
Defendants-Intervenors-Appellees.

June 6, 2007, Argued and Submitted, Honolulu, Hawaii

November 28, 2007, Filed

COUNSEL: Dennis Niles, Paul, Johnson, Park & Niles, Wailuku, Hawaii, for the plaintiffs-appellants.

William J. Wynhoff, Deputy Attorney General,

Department of the Attorney General, State of Hawaii, Honolulu, Hawaii, for the defendants-appellees.

JUDGES: Before: David R. Thompson, Marsha S. Berzon, and Richard C. Tallman, Circuit Judges.

OPINION

TALLMAN, Circuit Judge:

UFO Chuting of Hawaii, Inc. and K.M.B.S., Inc. (collectively "UFO") appeal the district court's summary judgment in favor of Defendants, the State of Hawaii and the United States as Intervenor (collectively "State"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm. We hold that UFO's right to operate vessels under its federal maritime coasting licenses does not preempt Hawaii law prohibiting parasailing off the coast of Maui during limited portions of the year to protect mating humpback whales. Because UFO does not qualify as a "prevailing party," the district court did not abuse its discretion in denying UFO's motion for attorney's fees.

I

UFO operates a commercial parasailing business offering parasailing excursions to adventure seekers off the coast of Maui and the Big Island of Hawaii. Parasailing is an "activity in which an individual is transported or carried aloft by a parachute, sail, or other material attached to a towline which is towed by a vessel." Haw. Code R. § 13-250-5. The United States Coast Guard inspects and licenses UFO's two vessels--the M/V UFO and the M/V CASEY ANN--to carry up

to twelve passengers in the "coastwise" trade between McGregor Point and Lipoa Point on the western coast of Maui. A portion of this area is located within the "Maui Humpback Whale Protected Waters." *See* Haw. Code R. § 13-256-112.

Between December 15 and May 15 of each year, when humpback whales are mating, bearing calves, and caring for their young, Hawaii state law prohibits any person from "operat[ing] a thrill craft, or engag[ing] in parasailing, water sledding, or commercial high speed boating, or operat[ing] a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui." Haw. Rev. Stat. § 200-37(i). Together with Hawaii Revised Statute § 200-38(c), state law, in effect, prohibits parasailing activity in all navigable waters surrounding Maui between December 15 and May 15 of each year.

On July 9, 2004, the United States District Court for the District of Hawaii granted UFO's motion for summary judgment on the basis that the federal Marine Mammal Protection Act ("MMPA") preempted Hawaii state law. *See UFO Chuting of Haw., Inc. v. Young*, 327 F. Supp. 2d 1220 (D. Haw. 2004).[1] The district court granted UFO's motion for a permanent injunction barring enforcement of the parasailing provision on September 29, 2004. The State appealed.

Subsequent to the district court's published decision, President George W. Bush signed into law the Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, § 213, 118 Stat. 2809 (2004)("Omnibus Bill"). Section 213 of the Omnibus Bill provides:

> [N]othwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

A day later, the State filed a motion to stay the permanent injunction and asked the district court to indicate whether it would entertain a motion under Federal Rule of Civil Procedure 60(b) should we issue a remand order. On December 13, 2004, before the injunction went into effect, the district court indicated that it would grant a Rule 60(b) motion because of the intervening change in the law. The district court also granted the State's motion to stay the permanent injunction. We issued a limited remand on January 10, 2005, and the district court granted the State's Rule 60(b) motion on March 31, 2005. The district court then vacated its prior judgment and entered summary judgment in favor of the State. However, because the district court failed to address UFO's Commerce Clause arguments, it granted UFO's motion for reconsideration on May 5, 2005, and issued an amended order granting summary judgment in favor of the State, now rejecting UFO's claim that the MMPA preempted state law. On July 7, 2005, the district court granted the State's motion for summary judgment on all remaining issues, rejecting UFO's last claim that its right to engage in coastwise trade under federal license preempts the parasailing restriction (as well as other

Commerce Clause claims). *See UFO Chuting of Haw., Inc. v. Young*, 380 F. Supp. 2d 1160 (D. Haw. 2005).

The district court then denied UFO's motion for attorney's fees, costs and expenses. The court reasoned that UFO was not the "prevailing party" because the permanent injunction never went into effect. Consequently, UFO never received a direct benefit from the temporary relief granted by the court. UFO timely appeals both rulings.

II

We review de novo the district court's grant of summary judgment. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). We view the facts in the light most favorable to UFO and draw all reasonable inferences in its favor. *Id.* at 825-26.

A

UFO contends that its Coast Guard license--authorizing it to carry up to twelve passengers in coastwise trade--preempts Hawaii's ban on parasailing because the license grants UFO a federal right of maritime passage that actually conflicts with Hawaii's seasonal ban. *See Young v. Coloma-Agaran*, 340 F.3d 1053, 1055 (9th Cir. 2003)(describing the three ways federal law may preempt state law, including when state law actually conflicts with federal law). An actual conflict "occurs 'where it is impossible . . . to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 1055-56 (alteration in original) (quoting *Freightliner Corp. v.*

Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995)).

"[N]o State may completely exclude federally licensed commerce." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Young*, 340 F.3d at 1056. However, a state "'may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power.'" *Young*, 340 F.3d at 1056 (quoting *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 277, 97 S. Ct. 1740, 52 L. Ed. 2d 304 (1977)); *see also Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960)(stating that so long as the federal law does not preempt state action, a state or local regulation "requires no more than compliance with an *orderly* and *reasonable* scheme of community regulation" (emphasis added)); *id.* at 443 ("Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action . . . .").

UFO argues that conflict preemption occurs "where state law has the effect of precluding employment of a vessel for the single purpose for which it was designed, constructed and licensed." In other words, because its two vessels were designed for parasailing, UFO contends that Hawaii cannot ban parasailing on the navigable waters in which its federal license authorizes it to engage in coastwise trade. For support, UFO cites *Young*, 340 F.3d 1053, and *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001).

In *Young*, the state of Hawaii banned all commercial

vessels from the Hanalei River or Hanalei Bay ocean waters at all times of the year. 340 F.3d at 1055 (discussing Haw. Code R. § 13-256-36). The plaintiffs operated commercial tour boats and held a federal license from the Coast Guard authorizing them to engage in coastwise trade. *Id.* The court agreed with the district court and concluded that the plaintiffs' federal license to engage in coastwise trade preempted the Hawaii rule. The plaintiffs' coasting license authorized them to engage in coastwise trade, which "includes the transportation of passengers." *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,214-15, 6 L. Ed. 23 (1824); *see also id.* ("[A] coasting license 'entitles a vessel to employment in unrestricted coastwise trade.'" (quoting 46 C.F.R. § 67.19(a))). Therefore, because Hawaii law "completely exclude[d] the plaintiffs from conducting their federally-licensed tour boat business" at all times, it "effectively rendered it impossible for the plaintiffs to comply with both federal and state law in order to ply their trade." *Id.* at 1057.[2] Thus, federal law preempted state law and, because there was an actual conflict, we declined to determine whether the State had properly exercised its concurrent power to alleviate user conflicts. *Id.*

Here, in contrast to *Young*, the ban on parasailing is only in effect for five months of the year. The Hawaii statute undoubtedly imposes a significant restriction on the ability of UFO to ply its trade, but the State has not "completely excluded" UFO from engaging in coastwise trade in the relevant waters as it did with the year-round ban in *Young*.[3] Moreover, UFO has presented no evidence that it is wholly economically infeasible to operate its business with the five-month ban, and has therefore not shown that it cannot "comply with both

federal and state law in order to ply [its] trade."[4] *Id.* at 1057.

Nor can UFO show that the Hawaii regulation is in actual conflict with the federal law because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Young*, 340 F.3d at 1055-56. By enacting section 213 of the Omnibus Bill, Congress permitted the State of Hawaii to regulate the operation of commercial vessels for the purpose of protecting humpback whales. Although the Omnibus Bill does not address the preemptive effect of federal Coast Guard licenses, it nonetheless suggests that Congress meant the Hawaii legislation protecting humpback whales to continue in force, despite a known impact on parasailing and similar commercial boating activity. We are thus especially reluctant to find a conflict with federal purposes here.

We therefore hold that Hawaii's regulation does not completely exclude federal licenses or actually conflict with federal law.

B

1

In *Douglas*, the Supreme Court made clear that, so long as it is not in conflict with federal law, "[s]tates may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." 431 U.S. at 277; *see also Huron Portland Cement Co.*, 362 U.S. at 447 (stating that possessing a federal license does not immunize the licensee from

lawful exercises of the state's police power). Having examined the proffered reasons for the Hawaii law, we hold that the parasailing ban is a reasonable regulation of federal licenses.

The parties dispute the level of deference the court should give the legislature in reviewing a statute for reasonableness that is not in actual conflict with federal law. The State contends that we should apply rational basis review, while UFO argues for a higher level of scrutiny. UFO contends that it "[i]s the State's burden to show [that] the [parasailing ban] sweeps no broader than necessary to achieve its putative purpose." In support, UFO cites *United States v. Locke*, 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000), for the proposition that, "[i]n the field of coastwise navigation, state legislation of this stripe is not presumed reasonable."

UFO misconstrues *Locke*. Although the Court did hold that there is no assumption of nonpreemption when there is a "history of significant federal presence," *id.* at 108, the Court was referring to field preemption--in which Congress leaves no room for state regulation--not conflict preemption, in which the question is whether compliance with both state and federal law is possible, *id.* at 108-110. In other words, when states have traditionally occupied the field, an assumption of nonpreemption still exists. *Id.* at 110.

Neither *Huron* nor *Douglas* defines "reasonable" in the context of conflict preemption; nevertheless, it is clear that when an exercise of police power does not affect a fundamental right, courts apply the same rational basis analysis employed in equal protection inquiries. *Id.* at

319-20; *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976). Therefore, UFO had the burden to negate any conceivably legitimate reason the State may have had in enacting the parasailing ban. *See Heller*, 509 U.S. at 319-20.[5] UFO failed to meet its burden.

To support the enactment of the parasailing ban, the Hawaii legislature found that "[t]he operation of thrill craft, parasailing vessels, and high-speed motorized vessels during certain times of the year poses an unacceptable risk of harm to endangered sea creatures such as migratory humpback whales and sea turtles." H.B. 2994, 1990 Haw. Sess. Laws 972. The legislature elaborated further on the impact to humpback whales, stating:

> The legislature declares that the waters of the State should be safe from the dangers of thrill craft, parasailing vessels, and high-speed motorized vessels during the annual migration of humpback whales to Hawaii especially in Maui waters identified as critical habitats for endangered humpback whales. Humpback whales are very acoustically oriented mammals. Continuous traffic and constant underwater noise created by thrill craft, parasailing vessels, and high-speed motorized vessels in near shore, shallow waters threaten humpback whale population recovery by displacing the whales from their favored habitat and further by disrupting the acoustic environment, creating an energetic cost to the whales in responses to these disturbances, disrupting the species' mating system, and threatening the survival of calves.

Id.[6]

UFO disputes this legislative finding, arguing that "[i]ntuitively, at least, a 28-foot vessel whose passengers are engaged in whale watching would seem to pose a greater risk of impacting a whale than an identical boat towing a parasailor whose operator is intent on staying clear of the whales." However, it is not our function to question the legislature's intuition. *See Heller*, 509 U.S. at 319.[7] Moreover, it is not the "whale watching" activity that poses a threat to the whale. Rather, high speed traffic causes underwater noise. This disturbance displaces whales from their favorite breeding grounds, disrupting mating behavior and threatening the survival of calves. Because the parasailing ban furthers the legitimate governmental purpose of protecting humpback whales, we hold that the statute is reasonable.

2

As the State notes in its brief, the Supreme Court has not clearly defined what constitutes "nondiscriminatory" state regulation of a federal licensee or the standards a reviewing court should apply. However, given its statements in *Douglas*, we can infer that the Court sought to incorporate the same standards of "nondiscriminatory" as it has applied in the context of the Commerce Clause.

The Commerce Clause forbids discrimination against interstate commerce. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991)(per curiam). In *Douglas*--a case discussing when states can impose regulations on federal licensees--the Court

discussed discrimination in the context of the Commerce Clause. *See Douglas*, 431 U.S. at 277 (stating that, in *Gibbons*, the Court struck down a state statute that "allowed some steam vessels to ply their trade while excluding others that were federally licensed"); *id.* (discussing *Manchester v. Massachusetts*, 139 U.S. 240, 11 S. Ct. 559, 35 L. Ed. 159 (1981), in which the Court held that a state statute that "makes no discrimination in favor of citizens of Massachusetts and against citizens of other States . . . may well be considered as an impartial and reasonable regulation").

A facially neutral statute may violate the Commerce Clause if "the burdens of the statute . . . so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines Inc.*, 951 F.2d at 983. A statute is unreasonable or irrational when "the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry." *Id.*; *see, e.g., Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353-54, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)(overturning a facially neutral statute that ultimately discriminated against out-of-state commerce); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144-46, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)(overturning an Arizona statute that prohibited local melon growers from shipping their produce to California for packing because the admitted purpose was to favor Arizona growers by requiring superior quality growers to have their produce packaged in Arizona).

The Hawaii ban on parasailing is facially neutral. It does not differentiate between residents and

nonresidents, or residents and non-citizens. Moreover, the benefits of the statute are not illusory, nor do they indicate favoritism to in-state industries. The purpose of the parasailing ban is to protect human safety and the environment. The legislature received evidence that noise caused by thrill craft and parasailing vessels disrupts the natural behavior of migratory humpback whales. By banning parasailing and thrill craft activity during the time of year in which humpback whales inhabit the waters off Maui, the legislature advanced its legitimate purpose of protecting the endangered species. Thus, we hold that the parasailing ban is nondiscriminatory and does not impose an unreasonable burden on interstate commerce.

III

We review for an abuse of discretion a district court's determination of attorney's fees under 42 U.S.C. § 1988. *Martinez v. Wilson*, 32 F.3d 1415, 1421-22 (9th Cir. 1994). A party is a "prevailing party" when "(1) it wins on the merits of its claim, (2) the relief received materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) that relief directly benefits the plaintiff." *Id.* at 1422.

A final judgment on the merits is not a condition precedent to obtaining the status of a "prevailing party." *Hanrahan v. Hampton*, 446 U.S. 754, 756-57, 100 S. Ct. 1987, 64 L. Ed. 2d 670 (1980)(per curiam)("The legislative history of [42 U.S.C. § 1988] indicates that a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'"

quoting H.R. Rep. No. 94-1558, at 7 (1976)). A party has "prevailed on the merits of at least some of (their) claims," *id.* at 758, when it has obtained a preliminary injunction that results in a direct and substantial benefit. *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980)(per curiam); *see also Dahlem v. Bd. of Educ. of Denver Public Schs.*, 901 F.2d 1508, 1512 (10th Cir. 1990) ("Such relief on the merits may fall short of a formal judgment so long as it works a material alteration of the substantial rights of the parties." (internal quotation marks and citations omitted)); *Grano v. Barry*, 251 U.S. App. D.C. 289, 783 F.2d 1104, 1109 (D.C. Cir. 1986). Therefore, when "a party . . . achieves the objective of its suit by means of an injunction issued by the district court[, it] is a prevailing party in that court, notwithstanding the fact that the case becomes moot, through no acquiescence by the defendant, while the order is on appeal." *Dahlem*, 901 F.2d at 1512. [8]

Having concluded that the subsequent statutory change did not undermine UFO's status as a prevailing party, we turn now to the question of whether UFO received a direct and substantial benefit from its initial award of a permanent injunction. The entry of judgment in a party's favor does not automatically render that party a "prevailing party" under § 1988. *Rhodes v. Stewart*, 488 U.S. 1, 3, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988)(per curiam). The judgment is not the end but a means to receiving some redress from the defendant. *Id.* To be considered a "prevailing party," the plaintiff must show that the judgment somehow affected the behavior of the defendant towards the plaintiff. *Id.* at 4; *see also* id. at 3-4 ("At the end of the rainbow lies not a judgment, but some action (or

cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, *or the termination of some conduct.*" (emphasis added)).

For instance, in *Williams*, the plaintiffs obtained a preliminary injunction against "pat-down" searches conducted via a special investigative procedure known as "Operation Zebra." 625 F.2d at 847. Before we could rule on the merits of the preliminary injunction, Operation Zebra ended, mooting the issue. We nonetheless upheld the plaintiffs' status as a prevailing party, stating, "[o]ur previous dismissal of the appeal as moot and vacation of the district court judgment d[id] not affect the fact that for the pertinent time period appellees obtained the desired relief." *Id.* at 847-48. In other words, because the plaintiffs obtained the relief they sought--a preliminary injunction preventing the appellants from continued enforcement of "Operation Zebra"--they received a direct benefit and qualified as a "prevailing party." *Id.*

In comparison to *Williams*, UFO did not receive a direct benefit. The permanent injunction was not the end; rather, it was a means to achieving the end. *Rhodes*, 488 U.S. at 3. Because the district court stayed the implementation of the permanent injunction before the State had to change its behavior--before Hawaii stopped enforcing its parasailing ban--UFO cannot be considered the "prevailing party."

IV

Hawaii's reasonable and nondiscriminatory seasonal ban on parasailing off the coast of Maui does not

completely exclude UFO from using its federal license. Entry of summary judgment in favor of the State of Hawaii was proper. Because the district court stayed its permanent injunction before UFO received a direct benefit, UFO is not a "prevailing party" under 42 U.S.C. § 1988. The district court therefore did not abuse its discretion in denying UFO's request for attorney's fees.

AFFIRMED.

*Pursuant to Fed. R. App. P. 43(c)(2), Allan A. Smith is substituted for Peter T. Young as Acting Chair of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, State of Hawaii; Ed Underwood is substituted for Richard Rice as Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources.

1In its ruling, the district court reasoned that the MMPA expressly preempted the parasailing provision by prohibiting the State from enforcing, or attempting to enforce, any state law related to the taking of marine mammals within Hawaii. *UFO Chuting of Haw., Inc.*, 327 F. Supp. 2d at 1222-23 (discussing the implications of 16 U.S.C. § 1379(a)). As an alternative holding, the district court concluded that the parasailing provision actually conflicted with a substantive right granted by the MMPA, allowing vessels to come within 100 yards of humpback whales. *Id.* at 1229-30 (discussing Pub. L. No. 103-238, 108 Stat. 532).

2The Hawaii Rule authorized two commercial use permits for kayaks to operate in the same area. *Id.* Although the court did not address this portion of the

regulation in *Young*, the small exception for kayaks does not undermine the court's conclusion that this was a complete ban. The kayak exception did not apply to the plaintiffs--who operated commercial tour boats--and thus, as applied to their commercial tour boats, the Hawaii Rule resulted in a complete ban.

3UFO relies heavily on a Fourth Circuit case, *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001), in which the court held that a Virginia law prohibiting "commercial transport of hazardous or nonhazardous solid waste . . . by ship, barge or other vessel upon" certain navigable waters was preempted by the plaintiffs' federal licenses. *Id.* at 323. The reasoning of *Waste Management* is, however, unclear. The court first mentions that the ban on "hazardous waste transport" constituted complete exclusion, but then goes on to state that the regulation was not reasonable. *Id.* at 348. It may be that the district court in this case was correct in concluding that the Fourth Circuit would not have conducted the reasonableness inquiry had it really thought there was a complete exclusion. Given that the case was decided at least in part on the ground that the regulation was unreasonable, we do not find its holding with regard to complete exclusion particularly illuminating.

4We recognize that there may be a point at which a seasonal ban such as this makes it impossible for a federal licensee to ply its trade. In this instance, UFO cannot conduct its parasailing business for five months out of the year. A longer ban or a ban on a different type of maritime business could result in such an economic impact to the licensee as to make operation of its business wholly infeasible. That is not the case here,

and we save for another day the question whether such an impact would lead to preemption of a state regulation.

5Under this standard, the issue is not whether there is a viable alternative use of UFO's tow boats, but whether the ban is reasonably related to a legitimate government interest. Because UFO has failed to raise a genuine issue of material fact regarding the reasonableness of this statute, the district court properly granted summary judgment to the State.

6Marine biologists Mark Ferrari and Deborah Glockner testified before the Hawaii legislature in 1990 regarding the disturbance caused by parasailing. They testified that "there is no question that the activities of parasailing and thrill craft operations have definitely displaced resting mothers and their newborn calves away from their preferred nearshore habitat." "Any high speed activity such as parasailing . . . and their related activities, produce both a point disturbance at the surface of the water, as well as an acoustic disturbance (noise pollution) underwater."

7UFO's argument that the district court had a duty to determine whether the evidence presented to the legislature met the standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), was rejected by this court in *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 & n.5 (9th Cir. 2005).

8This rationale is consistent with the Supreme Court's decision in *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). There, the

plaintiff sought declaratory and injunctive relief ordering the Florida Department of Banking and Finance to process its application to operate an industrial savings bank in Florida. *Id.* at 475. After the district court granted the plaintiff's motion for summary judgment, but before the Department of Banking and Finance processed the application or the Eleventh Circuit ruled on the merits of the appeal, the State of Florida amended its statutes, which mooted the litigation. *Id.* The Court held that, "[s]ince the judgment below is vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, Continental was not, at that stage, a 'prevailing party' as it must be to recover fees under § 1988." *Id.* at 483. In doing so, the Court did not hold that a party automatically loses its prevailing party status when the appeal becomes moot before a Court of Appeals reaches final judgment. *See id.* ("Whether [the plaintiff] can be deemed a 'prevailing party' in the district court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty, *see, e.g., Palmer v. Chicago*, 806 F.2d 1316, 1321 (7th Cir. 1986)[,] . . . [that w]e decline to resolve . . . ."). Rather, the Court reaffirmed established case law requiring a prevailing party to obtain a direct and substantial benefit. Because the plaintiff in *Lewis* never received the benefit it sought--the right to apply to the Florida agency--it lost its status as the prevailing party.

Civ. No. 03-00651 SOM/BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UFO CHUTING OF HAWAII, INC., a Hawaii corporation and K.M.B.S., INC., a Hawaii Corporation, d.b.a. Kaanapali Tours,
Plaintiffs,

vs.

PETER T. YOUNG, in his capacity as Chair of the Board of Land and Natural Resources, State of Hawaii; STEPHEN THOMPSON, in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii,
Defendants.

COUNSEL: For Plaintiffs: Dennis Niles, Paul Johnson Park & Niles, Wailuku, HI.

For Defendants: William J. Wynhoff, Office of the Attorney General, Honolulu, HI.

JUDGES: SUSAN OKI MOLLWAY, UNITED STATES DISTRICT JUDGE.

OPINION BY: SUSAN OKI MOLLWAY

OPINION

AMENDED ORDER GRANTING DEFENDANTS' MOTION FOR RELIEF FROM FINAL JUDGMENT

I. INTRODUCTION.

Defendants Peter Young and Stephen Thompson seek relief from this court's order of July 9, 2004, which declares that federal law preempts Hawaii's seasonal parasailing ban. Haw. Rev. Stat. § 200-37(i), as well as all related rules and regulations derived from that statute. Defendants argue that the court's order should be reconsidered in light of an intervening change in federal law that they say allows for the seasonal parasailing ban. The court agrees and vacates its earlier ruling. Given the recent change in federal law, Haw. Rev. Stat. § 200-37(i), as well as all rules and regulations derived from that statute, are no longer preempted by, or in conflict with, the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 et seq.

II. BACKGROUND.

On July 9, 2004, this court issued an order declaring unconstitutional Haw. Rev. Stat. 200-37(i), as well as all rules and regulations derived from that statute. Section 200-37(i) states:

> Between December 15 and May 15 of each year, no person shall operate a thrill craft, or engage in parasailing, water sledding, or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui as provided in section 200-38.

The court's ruling was based on the court's reading of the MMPA as expressly preempting Haw. Rev. Stat. 200-37(i), as well as regulations derived from the state statute. The court focused on 16 U.S.C. § 1379(a), which states:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1) of this section.

The court also concluded that Hawaii law was in direct conflict with federal law. Section 17 of the MMPA Amendments of 1994, titled "Human Activities Within Proximity of Whales," allows individuals to approach "no closer than 100 yards to a humpback whale," Pub. L. No. 103-238, 1994 Stat. 1636, whereas the relevant Hawaii regulations require everyone to stay 300 yards away from humpback whales in designated areas. See Haw. Reg. § 13-244-40(c) ("No person shall approach by any means . . . within three hundred yards of any humpback whale within designaed cow/calf areas.").

The court held the Hawaii laws and regulations invalid under the Supremacy Clause. Defendants timely appealed to the Ninth Circuit.

On December 8, 2004, while the appeal was pending, the Fiscal Year 2005 Omnibus Appropriations Bill

("Omnibus Appropriations Bill"), H.R. 4818, Public Law 108-447, 118 Stat. 2809, became law. Section 213 of the Omnibus Appropriations Bill ("section 213") states:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

Arguing that this new legislation altered the legal landscape of this court's earlier ruling, Defendants moved for a stay of the order filed on July 9, 2004. Defendants also asked the court to state whether it was willing to reconsider its previous order in light of the new legislation, if and when the Ninth Circuit remanded the case to this court for that purpose. The court granted Defendants' motion for a stay and indicated its willingness to reconsider the previous order. Defendants then asked the Ninth Circuit to remand the case. The Ninth Circuit granted the motion for remand, and this court now entertains Defendants' motion for relief from judgment under Fed. R. Civ. P. 60(b)(5). UFO challenges the constitutionality of section 213.

III. LEGAL STANDARD.

A party may seek relief from a final judgment, order, or proceeding under Fed. R. Civ. P. 60(b)(5) if "it is no longer equitable that the judgment should have

prospective application." *Jeff D. v. Kempthorne*, 365 F.3d 844, 851 (9th Cir. 2004). For relief to be granted, "There must be a 'significant change in facts or law that warrants revision of the decree' and 'the proposed modification must be suitably tailored to the changed circumstance.'" *Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999)(quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 393, 116 L. Ed. 2d 867, 112 S. Ct. 748 (1992)).

IV. ANALYSIS.

Section 213's express authorization of State of Hawaii laws and regulations protective of humpback whales alters the preemptive effect of the MMPA. Section 213, as a valid constitutional enactment, renders Hawaii's seasonal parasailing ban no longer preempted by federal law.

A. Section 213 Directly Addresses The Bases of this Court's Earlier Ruling.

Before considering UFO's constitutional challenges to section 213, this court examines whether section 213, if upheld as constitutional, would affect this court's earlier analysis. This court previously held that the MMPA expressly preempted Haw Rev. Stat. § 200-37 , and that federal and state laws were in conflict. Section 213 directly addresses both defects.

Section 213 states that "the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales." This language

expressly authorizes Hawaii to pass laws and regulations relating to the conservation and management of humpback whales. The statute at issue in this case, Haw. Rev. Stat. § 200-37(i), seeks to promote the conservation and management of humpback whales by regulating parasailing operations. By specifically authorizing the State of Hawaii to pass this type of legislation, section 213 eliminates any federal preemption of Haw. Rev. Stat. § 200-37(i).

Section 213, if constitutional, would also resolve any direct conflict between the MMPA and Haw. Rev. Stat. § 200-37(i) This court earlier held that the Hawaii law conflicted with federal law, as the MMPA allowed individuals to approach within 100 yards of marine mammals, while Hawaii regulations required staying 300 yards from marine mammals. Section 213 expressly allows the State of Hawaii to enact regulations that are more restrictive than federal law, thus curing any direct conflict.

UFO urges this court to avoid reaching the constitutional question by holding that section 213 does not apply in any event to Hawaii's seasonal parasailing ban. Section 213 authorizes enforcement of state laws or regulations only "with respect to the operation . . . of recreational and commercial vessels." Hawaii's seasonal parasailing ban, UFO argues, is a ban on an activity, not a restriction on the operation of the recreational and commercial vessels with respect to any activity. The court is unpersuaded by this purported distinction. Under Haw. Rev. Stat. § 200-37(i), "Between December 15 and May 15 of each year, no person shall . . . engage in parasailing . . . or *operate* a motor vessel towing a person engaged in water sledding or parasailing on the

west and south shore of Maui . . . ." (emphasis added). The Hawaii statute is, on its face, a state law with respect to the operation of recreational and commercial vessels that falls within the scope of section 213.

B. Section 213 is Valid.

Having decided that section 213 does directly cover Haw. Rev. Stat. § 200-37(i) and related rules and regulations, as well as the reasons this court previously invalidated that Hawaii law, this court now examines whether section 213 is a valid federal law. UFO contends that section 213 is unconstitutional on two grounds. First, UFO contends that section 213 violates the separation of powers doctrine by dictating a judicial result without amending underlying law. Second, UFO argues that section 213 is not rationally related to any legitimate government interest. The court rejects both arguments.

1. Section 213 Does Not Violate the Separation of Powers Doctrine.

Section 213 alters substantive law by changing the preemptive effect of the MMPA. Accordingly, the statute does not violate the separation of powers doctrine. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 118 L. Ed. 2d 73, 112 S. Ct. 1407 (1992); *United States v. Klein*, 80 U.S. 128, 20 L. Ed. 519, 7 Ct. Cl. 240 (1871).

Under the test articulated in Klein, a congressional statute violates the separation of powers if it "impermissibly direct[s] certain findings in pending litigation, without changing any underlying law." *Cook*

Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 990-91 (9th Cir. 1999) (quoting *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993)).

In Klein, the Supreme Court invalidated a federal law stating that "no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States." Finding that the act "prescribed a rule for the decision of a cause in a particular way," the Court held that Congress had "passed the limit which separates the legislative from the judicial power." *Id.* at 146-47. The Court in Klein specifically noted that the decision was consistent with *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 15 L. Ed. 435 (1855). In that case, the Court had upheld a statute legalizing a bridge that the Court had previously deemed a nuisance, and converting the bridge into a post road. *Id.* at 430. The Court in Klein distinguished the two cases, noting that the congressional act in Wheeling had changed an underlying law, leaving the Court free to apply its ordinary rules to the changed legal landscape. *Klein*, 80 U.S. at 147. The statute at issue in Klein, by contrast, directed specific judicial findings without ever amending the underlying law. *Id.* at 147-48.

The Court revisited the Klein and Wheeling tests in Robert son, 503 U.S. at 429. In Robert son, environmental groups challenged section 318 of the Northwest Timber Compromise of 1990 ("the Compromise"). Congress passed the Compromise in response to on-going litigation over timber harvesting and its effect on the endangered northern spotted owl. *Id.* at 432-33. Section 318 stated:

> The Congress hereby determines and directs that management of areas . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No. 89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil. No. 89-99 (order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

Robertson, 503 U.S. at 435.

Arguing that references in the statute to pending litigation were proof of congressional intent to invade the province of the courts, environmentalists argued that the Compromise violated Klein. The Court disagreed. The Court held that the Compromise "replaced the legal standards underlying the two original challenges with those set forth in [the new statute] without directing particular applications under either the old or new standards." *Id.* at 437. The Compromise, the Court concluded, was therefore similar to the statute in Wheeling and did not violate the separation of powers. *Id.* at 438.

The Ninth Circuit has interpreted Robertson as indicating "a high degree of judicial tolerance for an act of Congress that is intended to affect litigation so long as it changes the underlying substantive law in any detectable way." *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 991 (9th Cir. 1999); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993).

Applying Robert son, as well as the high level of deference generally accorded to the constitutionality of federal statutes, see *Gray*, 989 F.2d at 1567, the Ninth Circuit has repeatedly upheld statutes against Klein challenges. See, e .g., *Cook Inlet*, 166 F.3d at 991 (declaring constitutional a congressional act authorizing a foundation to provide health care services under the Indian Self-Determination and Education Assistance Act); *Atonio v. Wards Cove Packing Co., Inc.*, 10 F.3d 1485, 1493 (9th Cir. 1993) (upholding the civil rights provision barring disparate impact claims filed before a certain date) ; *Gray*, 989 F.2d at 1570 (upholding an amendment to the Securities Exchange Act changing the limitations period for private civil actions).

In *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994), the court upheld a provision of the Arizona-Idaho Conservation Act of 1988 ("AICA"), Pub. L. No. 100-696, 102 Stat. 4571, against a separation of powers challenge. See 21 F.3d at 901. The provision, which dealt with telescope construction in an environmentally and archeologically sensitive area, stated that "the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization for the first three telescopes." Id. The plaintiffs in the case argued that this provision dictated the result of an existing court case without changing the underlying law. Id.

The Ninth Circuit disagreed, holding that the AICA changed the underlying law and thus did not fall under Klein. *Id.* at 902. The court noted that the AICA expressly suspended the requirements of the National Environmental Protection Act with respect to the

construction of the first three telescopes and "implicitly suspended . . . and replaced" the requirements of the Endangered Species Act. Id. The Ninth Circuit upheld the statute. *Id.* at 904.

Similarly, section 213 does not direct this court to make any specific finding of fact or application of law. Section 213 is far broader than the statutes ultimately upheld in Robert son and Apache Surivial, which expressly directed results in specifically named cases and telescope construction projects, respectively. *Robertson*, 503 U.S. at 435, Apache Survival, 21 F.3d at 902.

Section 213 also satisfies the second part of the *Robertson* test. Section 213 changes substantive law by amending all federal laws relating to the conservation of marine mammals. The amendment alters the preemptive effect of those federal laws, expressly authorizing the State of Hawaii to enforce its laws and regulations in this area "notwithstanding any other Federal law related to the conservation and management of marine mammals." In short, section 213 exempts Hawaii from 16 U.S.C. § 1379(a), which otherwise preempts state laws and regulations "relating to the taking" of marine mammals.

UFO contends that, to pass judicial scrutiny under Klein, section 213 must "involve a change in the substantive provision on which the judgment or decree is based," in this case, the MMPA. Section 213 does not specifically mention 16 U.S.C. § 1379 or any other section of the MMPA, and UFO argues that this silence causes section 213 to dictate a result without amending the underlying law.

No express reference to the MMPA, however, is necessary. By its terms, section 213 applies to "any other Federal law related to the conservation and management of marine mammals." The MMPA is necessarily included, and its preemptive effect is altered by the new legislation.

Section 213 is more explicit in referring to underlying law than the statute upheld in Robertson. That statute amended underlying law only by reference to specific cases involving the laws in issue. 503 U.S. at 440. Section 213's substantive change to the law is a broader and more significant change in the law than the temporary and project-specific amendments addressed in Robertson and Apache Survival. In Robertson, for example, the Compromise affected only those cases identified in the statute by name. 503 U.S. at 440. Similarly, the appropriation rider in Apache Survival affected only the specific telescope projects at issue. 21 F.3d at 902. Here, by contrast, section 213 affects the preemptive effect of all federal statutes on any Hawaii statute in the area. Unlike the statutes upheld in Robert son andApache Survival, section 213 applies beyond the case at hand.

Nor is the court moved by UFO's complaint that section 213 is not entitled to deference because it was passed as a rider to an appropriations bill. "Congress may . . . amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson*, 503 U.S. at 440. The statute in this case clearly amends the preemptive effect of federal statutes relating to marine mammals.

2. Section 213 Passes Rational Basis Review.

Section 213 exempts only Hawaii from the preemptive effect of federal marine mammal statutes and applies only to laws relating to humpback whales. Arguing that there is no rational basis for distinguishing between Hawaii and other coastal states, or between humpback whales and other marine mammals, UFO concludes that section 213 violates the equal protection clause of the Fourteenth Amendment. The court disagrees.

The Supreme Court has articulated the standard for evaluating the constitutionality of statutes that neither implicate fundamental rights nor create suspect classifications:

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental [**17] purpose.

Heller v. Doe, 509 U.S. 312, 319-20, 125 L. Ed. 2d 257, 113 S. Ct. 2637 (1993). Further, a State "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320. Instead, "[a] statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 321. This standard of review is "highly deferential," *United States v. Hancock*, 231 F.3d 557, 566 (9th Cir. 2000), and "is not a license for courts to judge the wisdom, fairness, or logic of legislative

choices." *Heller*, 509 U.S. at 319 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)).

Section 213 furthers' the legitimate governmental purpose of protecting humpback whales, an endangered species. The statute, as a whole, thus satisfies rational basis review.

UFO fails to meet its burden of proving that there is no rational basis for the geographic classification of the statute, which exempts Hawaii from the preemptive effect of the MMPA. Geographic distinctions in legislative acts have been upheld by the courts, so long as they are rationally related to a legitimate government interest. See *Ft. Smith Light & Traction Co., v. Board of Improv.*, 274 U.S. 387, 387, 71 L. Ed. 1112, 47 S. Ct. 595 (1927) (the Fourteenth Amendment "does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state").

UFO misconstrues its burden of "negativing every conceivable basis which might support" Congress's decision to allow only Hawaii to escape the preemptive effects of the MMPA. See *Heller*, 509 U.S. at 321. UFO says that "the State does not suggest a rationale for exempting Hawaii from the preemptive effect of [the MMPA,]" as if it is the State's burden to show a rational basis. At the hearing on the present motion, UFO addressed the issue by arguing that in excusing Hawaii from the preemptive effect of the MMPA while ignoring other coastal states, Congress acted irrationally.

Congress, however, could have acted on a variety of grounds. Hawaii is the only island state. Hawaii's challenges in managing its aquatic resources, including marine mammals, are unique. Hawaii's sui generis relationship with its surrounding waters is thus a "conceivable basis" on which Congress might have singled out Hawaii. Hawaii also bears a unique cultural relationship to the ocean and to humpback whales, as the Native Hawaiian culture affords humpback whales great respect. See Hawaiian Islands Humpback Whale National Marine Sanctuary Final Environmental Impact Statement/Management Plan, 1997, Ex. DN-11 to Plaintiffs' Motion for Summary Judgment on First Claim For Relief, filed March 3, 2004. Congress has, in other contexts, recognized Hawaii's unique cultural heritage. See, e .g., 42 U.S.C. § 11701 ("The Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions."); 20 U.S.C. § 7512(12) ("the United States has recognized and reaffirmed that Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands"); see also *Doe v. Kamehameha Schools*, 295 F. Supp. 2d 1141, 1174 n.29 (D. Haw. 2003) ("Over eighty-five congressional enactments provide preferences or services to Native Hawaiians."). Congress may thus have considered cultural issues in allowing Hawaii to enforce its own laws.

Of course, it could be argued that it would make more sense for Congress to adopt an approach that covered other states' costal areas or indigenous cultures, or all

marine mammals. But rational basis review turns on what is rational, not what someone might consider best. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) ("rational distinctions may be made with substantially less than mathematical exactitude"). Thus, Congress may accord one state or one species more protection than another. Congress may, for instance, value certain animals over others because of the animals' history, relationship with humans, beauty, symbolism, or other characteristics, all of which may cause Congress to extend special protection to a species. UFO establishes no reason for this court to second-guess legislative decisions relating to section 213.

UFO also argues that it is irrational to permit state regulations that protect marine mammals to exceed federal regulations promulgated by the National Oceanic and Atmospheric Administration. The court sees no irrationality at all. Congress may and sometimes does permit states to enact more stringent environmental regulations than the federal government. For example, the Endangered Species Act, 16 U.S.C. § 1535(f), provides, "Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter . . . ." This provision has never been deemed unconstitutional. And in *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 763 n.3 (9th Cir. 1983), the Ninth Circuit, quoting the legislative history to the Endangered Species Act, noted that "the states would and should be free to adopt legislation or regulations that might be more restrictive than that of

the Federal government."

UFO further argues that it was "irrational for Congress to presume the State of Hawaii has the institutional resources . . . to determine the need for increased regulation of commercial boating in conserving and managing humpback whales while in Hawaiian waters." UFO, however, offers no evidence that Hawaii lacks institutional resources, or that Congress irrationally vested Hawaii with authority.

C. UFO's Other Arguments are Unpersuasive.

The heart of UFO's position is the alleged irrationality not of section 213, but of the Hawaii law imposing a seasonal ban on parasailing. But the merits of Haw. Rev. Stat. § 200-37(i) are not in issue on the present motion.

UFO also argues that section 213 deserves "heightened scrutiny" because it allows "enforcement of measures . . . that prevent [] operators from using their vessels for the single form of coastwise activity for which they were designed, built and licensed by the federal government." In its papers, UFO appears to make a "taking" claim without calling it that. If a taking has occurred, it is effected through Haw. Rev. Stat. § 200-37(i) and its related regulations, not section 213, which merely allows Hawaii to enforce its environmental laws in this area.

UFO also appears to be arguing that section 213 violates the Commerce Clause. See Opp. Memo at 18 ("Section 213 should be invalidated because it facilitates enforcement of unreasonable state regulation of

interstate commerce."). But Congress can itself regulate interstate commerce under the Commerce Clause, and UFO makes no showing that this congressional regulation (as opposed to a state regulation) violates the Commerce Clause. UFO may actually be claiming that it is Haw. Rev. Stat. § 200-37(i) that violates the "dormant commerce clause" by allegedly discriminating against interstate commerce.

A state regulation violates the "dormant commerce clause" if (1) the regulation facially discriminates against interstate commerce; or (2) a regulation that is facially neutral excessively burdens interstate commerce in relation to local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

UFO has not thus far articulated any unique burden to interstate commerce interests, as opposed to local interests, but the court leaves the "dormant commerce clause" challenge for further adjudication. The present motion concerns the effect of section 213 on Hawaii law, not the effect of the "dormant commerce clause" on Hawaii law.

Finally, at the hearing on the present motion, UFO argued that section 213 impermissibly deprives UFO of its liberty interests under the Due Process Clause. UFO contended that section 213 deprives UFO of the opportunity to object to governmental action in administrative proceedings. Congress may, however, pass laws that abrogate, or even eliminate, the statutorily created protections of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. The Constitution does not, in guaranteeing rights under the

Due Process Clause, guarantee all of the specific procedures laid out in the APA. Section 213 does not violate any constitutional right just because it allows state regulations.

V. CONCLUSION.

Section 213 is a valid enactment that alters the preemptive effect of the MMPA. Section 213 is an intervening change in controlling law that this court now applies to determine whether Hawaii's seasonal parasailing ban is valid. The court grants Defendants' motion for relief from this court's previous order. The earlier order is hereby vacated. Haw. Rev. Stat. § 200-37(i) and all rules and regulations derived from that statute are not preempted by the MMPA.

Summary judgment is granted to Defendants as to Count 1 of the Second Amended Complaint. This leaves for adjudication Count 2 of UFO's Second Amended Complaint.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 5, 2005.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

Civ. No. 03-00651 SOM/BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UFO CHUTING OF HAWAII, INC., a Hawaii corporation and K.M.B.S., INC., a Hawaii Corporation, d.b.a. Kaanapali Tours,
Plaintiffs,

vs.

PETER T. YOUNG, in his capacity as Chair of the Board of Land and Natural Resources, State of Hawaii; STEPHEN THOMPSON, in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii,
Defendants.

July 7, 2005, Decided

COUNSEL: For Plaintiffs: Dennis Niles, Paul Johnson Park & Niles, Wailuku, HI.

For Defendants: William J. Wynhoff, Office of the Attorney General, Honolulu, HI.

OPINION

ORDER GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Defendants Peter Young and Stephen Thompson renew their motion for summary judgment on all remaining Counts of UFO's Second Amended Verified Complaint ("SAVC"). The court grants Defendants' motion.

II. BACKGROUND.

The facts of this case have recently been set forth in an order by this court filed May 5, 2005. The court incorporates by reference the "BACKGROUND" section of that order and adds the following:

> In enacting Haw. Rev. Stat. § 200-37(i), the legislature relied in part on the following finding:
>
> > Continuous traffic and constant underwater noise created by thrill craft, parasailing vessels, and high-speed motorized vessels in near shore, shallow waters threaten humpback whale population recovery by displacing the whales from their favored habitat and further by disrupting the acoustic environment, creating an energetic cost to the whales in responses to these disturbances, disrupting the species' mating system, and threatening the survival of calves.

H.B. 2994, 1990 Haw. Sess. Laws 972.

III. STANDARD OF REVIEW.

The court further incorporates its standard of review for summary judgment from its May 5, 2005 order.

IV. ANALYSIS.

In its May 5, 2005, order, this court granted Defendants' motion for summary judgment with respect to Count I of the SAVC. Defendants have renewed their motion for summary judgment with respect to UFO's claims under the "Dormant Commerce Clause." The parties have also agreed that the court may address at this time UFO's claims of "conflict preemption" with respect to UFO's federal maritime licenses. The court grants Defendants' motion for summary judgment.

A. UFO Does Not Raise Any Triable Issue Under The Dormant Commerce Clause.

The Commerce Clause of the Constitution grants Congress the power to regulate "Commerce . . . among the several states." The Commerce Clause implicitly provides that a State may not "jeopardize the welfare of the Nation as a whole by placing burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 162 L. Ed. 2d 407, 125 S.Ct. 2419, 2423 (2005). This implicit limitation is known as the "Dormant Commerce Clause."

A statute that, like Haw. Rev. Stat. § 200-37(i), is "facially neutral" with respect to interstate commerce violates the "Dormant Commerce Clause" only if "the burdens of the statute . . . so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S.

Ct. 844 (1970). "Such is the case where the asserted benefits of the statute are in fact illusory." *Alaska Airlines*, 951 F.2d at 983.

The federal courts grant state legislatures considerable deference in such inquiries. See *Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) ("Even in the context of dormant commerce clause analysis, the Supreme Court has frequently admonished that courts should not second-guess the empirical judgments of lawmakers concerning the utility of legislation."). States "are not required to convince the court of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981). Rather, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Id.; see also *Lingle v. Chevron U.S.A., Inc.*, 161 L. Ed. 2d 876, 125 S. Ct. 2074, 2074 (2005) ("The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established").

UFO does not raise any issue of fact as to whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. at 142.

UFO first contends that the benefits of the seasonal parasail ban are "illusory" because the State allegedly cannot prove that parasail operations threaten whale populations. UFO argues initially that the findings the State has made do not meet the standard of

admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). The Ninth Circuit, however, has expressly rejected the suggestion that a legislature must apply the evidentiary standards of Daubert in considering whether evidence supports proposed legislation. See *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005) ("While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform."); see also *G.M. Enters., Inc. v. Town of St. Joseph, Wise.*, 350 F.3d 631, 640 (7th Cir. 2003) ("A requirement of Daubert-quality evidence would impose an unreasonable burden on the legislative process").

In fact, the State had considerable evidence that the seasonal ban would protect humpback whales. The legislature received extensive testimony from interested parties, including scientists, community groups, and business groups. See Exs. B-F to Wynhoff Decl., filed February 26, 2004. The scientific testimony submitted in support of a seasonal ban stated, "Parasailing and thrill craft activities *by their nature* disrupt the calm of [humpback whale] nursery areas, and have forced the resting mothers and their newborns . . . away from their preferred habitat." Ex. B to Wynhoff Decl., filed February 26, 2004 (emphasis in original). According to other testimony, thrill craft and parasail boats were displacing whales from nearshore waters. See Ex. C to Wynhoff Decl., filed February 26, 2004.

UFO relies on an academic study by Drs. Whitlow Au and M. Green that concludes that "it is unlikely that the

levels of sounds produced by the boats in our study would have any grave effects on the auditory system of humpback whales." UFO Ex. DN-18. UFO contends that this study conclusively "debunks the assertion that the noise made by tow boats engaged in parasailing is capable of 'disrupting' the acoustical environment" of whales. UFO Opp. at 10.

The court does not agree that this study proves that the seasonal ban's benefits are illusory. First, in stating that it is "unlikely" there is an impact, Au and Green are not saying there is no impact. See UFO Ex. DN-18. Even if this study reached a supposedly definitive determination, the legislature had other studies reaching the opposite conclusion. This court will not here weigh the merits of competing scientific viewpoints and is not equipped to make such [**7] determinations. It is the job of the legislature to consider competing evidence when fashioning legislation. [1] One study that arguably cuts against the determination made by the legislature does not invalidate the statute's putative benefits.

UFO does not raise any triable issue of fact with respect to the legislature's decision. Instead, UFO appears to be asking this court to substitute its judgment for that of the legislature. Unless a statute or appellate court directs this court to perform that task, this court will not so act.

The court further notes that UFO has presented no evidence demonstrating the ban's impact on interstate commerce. UFO contends that it is the State's burden to show that the ban's benefit outweighs its effect on interstate commerce. UFO is incorrect. The party

challenging the validity of a statute under the Commerce Clause has the burden of demonstrating that the burden on interstate commerce is clearly excessive to the benefit. See *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 471 (9th Cir. 2001) (requiring the plaintiff to provide "specific details" as to how the local ordinance affected interstate commerce). UFO has not presented sufficient evidence to raise a question of fact as to whether the state law imposes clearly excessive burdens on interstate commerce.

B. UFO Does Not Raise Any Triable Issue of Fact With Respect to Conflict Preemption.

UFO further contends that the seasonal ban on parasailing "renders [their] vessels inoperable for any commercial purpose." UFO Opp. at 15. Comparing this case to the situation in *Young v. Coloma-Agaran*, 340 F.3d 1053, 1055 (9th Cir. 2003), UFO argues that Haw. Rev. Stat. § 200-37(i) impermissibly restricts the coastwise trade of UFO's vessels in contravention of UFO's federal licenses.

1. Haw. Rev. Stat. § 200-37(i) Is Not a Complete Ban On Coastwise Trade.

In Young, the Ninth Circuit ruled that a state law banning commercial boating in Hanalei Bay violated the Supremacy Clause. *Id.* at 1057. Because the "ban completely excluded the plaintiffs from conducting their federally licensed tour boat business in Hanalei Bay," it was preempted by their federal license permitting coastwise trade in Hanalei Bay. Id.

The present case is unlike Young. The state regulation in Young did not merely ban carrying passengers; it stated that no commercial permits would be issued for vessels to operate in Hanalei Bay, with the exception of two permits for commercial kayaks. *Young*, 340 F.3d at 1055. The regulation in Young banned virtually all commercial trade in Hanalei Bay and therefore conflicted with the plaintiffs' federal licenses allowing coastwise trade.

By contrast, Haw. Rev. Stat. § 200-37(i) prohibits parasailing and certain other forms of thrill craft activity. UFO's federal license gives it the right to engage in coastwise trade; it does not give it a federally created right to operate a parasailing business. The state regulation permits numerous commercial uses of the Lahaina-Kaanapali waterway, and UFO may engage in coastwise trade other than parasailing and thrill craft activity in those waters.

UFO notes that the statute in Young did not apply to "pleasure craft and fishing vessels temporarily anchored for a period of less than 72 hours." See Haw. Rev. Stat. § 200-6(b). UFO therefore contends that, as in Young, the availability to UFO of other commercial activities in the Lahaina-Kaanapali waterway does not prevent section 200-37(i) from being an unconstitutional complete ban. The Ninth Circuit in Young, however, declined to address the effect of the provision on pleasure craft and fishing vessels, noting that the parties had not briefed the issue. See 340 F.3d at 1057 n.1. Thus, in finding a complete ban, the Ninth Circuit was proceeding as if pleasure craft and fishing vessels were not allowed. Here, by contrast, the parties have fully briefed the availability of other uses, and this

court is taking those other uses into account.

UFO's argument goes too far. If boats specifically built for parasailing may not be precluded from being used for parasailing, parties could circumvent otherwise reasonable and permissible regulations through their boat designs. For example, a state would then be prevented from enforcing speed regulations on boats that were specifically built for racing and that could only be operated profitably as racing boats. UFO's federal license allows it to engage in coastwise trade; it does not allow it to engage in the most profitable type of coastwise trade given its type of vessels. UFO's vessels can conduct commercial activity in the Lahaina-Kaanapali waterway; their federal licenses provide no further rights.

UFO's reliance on *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001), is unavailing. In that case, the Fourth Circuit ruled that a regulation that prohibited federally licensed barges from transporting any type or any amount of solid waste on three rivers in Virginia "completely excludes federally licensed commerce." *Id.* at 348. UFO contends that a ban on hauling waste, though not necessarily restricting other commercial activity on the rivers, is indistinguishable from a ban on parasailing, which still allows for other types of commercial activity.

The Fourth Circuit in Waste Management, however, did not actually consider the regulation to be a complete ban on licensed commerce, despite the court's reference to a complete exclusion. Immediately after declaring that the ban "completely excludes" federally licensed commerce, the court continued, "The reasonableness of

such a *complete ban* is simply not supported by the evidence in the record, even when viewed in the light most favorable to the Defendants." *Waste Management*, 252 F.3d at 348 (emphasis added). Had the ban been complete, the reasonableness of the regulation would have been irrelevant. Once a court finds a ban complete, its inquiry ends. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) [**13] ("That no State may complete exclude federally licensed commerce is indisputable"); see also *Young*, 340 F.3d at 1057 (declining to analyze the reasonableness of the Hanalei Bay restriction upon finding the restriction's complete ban to be in conflict with federal law). The Fourth Circuit's analysis of the reasonableness of the regulation implicitly recognized that the regulation was not a complete ban.

2. Haw. Rev. Stat. § 200-37(i) Is Reasonable and Nondiscriminatory.

Under Young, state regulation may also conflict with a federal license if that regulation is unreasonable or discriminatory. Id. at 1056-57. This court, however, has already determined that Haw. Rev. Stat. § 200-37(i) is reasonable and nondiscriminatory. See May 5, 2005, Order at 13 (Haw. Rev. Stat. § 200-37(i) passes rational basis review).

V. CONCLUSION.

Defendants' motion for summary judgment is granted. This order disposes of all remaining claims raised by the Second Amended Complaint. The Clerk of Court is directed to enter judgment in favor of Defendants.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 7, 2005.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

Footnotes

1 The Au and Green study was published after the legislature enacted the parasailing ban and therefore was obviously not considered by it at the time. UFO contends that the court must consider the evolving conclusions of the scientific field. In assessing the reasonableness of legislative action, however, the key question is whether the legislature acted reasonably at the time the legislation was enacted. See e. g., *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1323 (4th Cir. 1994) (noting that new evidence supposedly undercutting the effectiveness of a law should be addressed to the legislature, not a court) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976) (holding that the "judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations")).

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Civ. No. 03-00651 SOM/BMK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UFO CHUTING OF HAWAII, INC., a Hawaii corporation and K.M.B.S., INC., a Hawaii Corporation, d.b.a. Kaanapali Tours,
Plaintiffs,

vs.

PETER T. YOUNG, in his capacity as Chair of the Board of Land and Natural Resources, State of Hawaii; STEPHEN THOMPSON, in his capacity as Acting Administrator, Division of Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii,
Defendants.

ORDER AFFIRMING MAGISTRATE'S RECOMMENDATION THAT PLAINTIFFS' AMENDED MOTION FOR ATTORNEY'S FEES BE DENIED

I. INTRODUCTION.

Plaintiff UFO Chuting of Hawaii, Inc., objects to the Magistrate Judge's Findings and Recommendation that Plaintiffs' Amended Motion for Attorney's Fees, Costs and Expenses be Denied. Because Plaintiffs are not "prevailing parties," the court affirms the Magistrate Judge's Recommendation and denies Plaintiffs' motion for fees, costs and expenses.

II. BACKGROUND.

Plaintiff UFO, a parasail operator, filed this suit on November 28, 2003, seeking to invalidate Haw. Rev. Stat. § 20027, which bans parasailing in specific state waters between December 15 and May 15 of each year. On July 9, 2004, Plaintiff UFO won a permanent injunction against Defendants in which this court held that the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., preempted Haw. Rev. Stat. § 200-37. The court therefore held that the seasonal parasail ban was unconstitutional.

UFO then filed a motion for attorney's fees, costs, and expenses. This court referred the motion to the Magistrate Judge, who issued his Findings and Recommendation on October 28, 2004. The Magistrate Judge recommended that UFO's motion be denied, as UFO had not prevailed on any claim giving rise to a fee award. On November 8, 2004, UFO stated its objections to the Magistrate Judge's Findings and Recommendation.

On December 9, 2004, before the court heard arguments on UFO's objection to the Magistrate's Findings and Recommendation, Defendants moved for a stay of the court's July 9, 2004, order. Defendants argued that Congress had altered the preemptive effect of the Marine Mammal Protection Act through the Fiscal Year 2005 Omnibus Appropriations Bill, signed into law on December 8, 2004. The court granted the stay on December 13, 2004, and parasailing was not allowed during the seasonal ban, which began two days later. Defendants then moved for an order granting relief from the final judgment of the July 9, 2004, order. The

court granted the motion, and, in a March 31, 2005, order, vacated the July 9, 2004, injunction order. A final order granting summary judgment on all remaining claims to Defendants has been filed.

III. LEGAL STANDARD.

Under Fed. R. Civ. Proc. 54 (d) (2) (D) and Local Rule 53.1, a motion for attorney's fees may be referred to a magistrate judge "as if it were a dispositive pre-trial matter." Under 28 U.S.C. § 636 (b) (1) (B), when a party objects to the Magistrate Judge's findings or recommendation on such a matter, a district court must make a de novo determination of those portions of the Magistrate Judge's findings to which objection is made. Local Rule 74.2; accord Kaluna, 952 F. Supp. at 1429. The court may then accept, reject, or modify, in whole or in part, the Magistrate Judge's findings or recommendation. See Local Rule 74.2.

De novo review means the court must consider the matter anew, as if it had not been heard before and as if no decision previously had been rendered. United states v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). Thus, although the district court need not hold a de novo hearing, the court's obligation is to arrive at its own independent conclusion. United States v. Remsing, 874 F.2d 614, 617 (9th Cir. 1989).

IV. ANALYSIS.

The court's December 13, 2004, stay of its previous order, as well as the court's March 31, 2005, order vacating the injunction, prevented UFO from deriving any benefit from that injunction. UFO is therefore not a

prevailing party.

To qualify for an award of attorney's fees under 42 U.S.C. § 1988, even assuming (but not deciding) that statute applies, a plaintiff must be a "prevailing party" within the meaning of the statute. Farrar v. Hobby, Jr.- 506 U.S. 103, 109 (1992). A plaintiff is a prevailing party only when (1) it wins on the merits of its claim, (2) the relief received materially alters the legal relationship between the parties by modifying the defendant's behavior, and (3) that relief directly benefits the plaintiff. Martinez v. Wilson, 32 F.3d 1415, 1422 (9th Cir. 1994) (citing Farrar, 506 U.S. at 111).

UFO earlier won a permanent injunction, as well as a declaration that Haw. Rev. Stat. § 200-37 was unconstitutional. At one time, UFO could therefore be said to have prevailed on the merits of its claim, and to have received an injunction that materially altered the legal relationship between the parties. The court now turns to the third prong, whether the relief UFO received resulted in any direct benefit to UFO.

To satisfy the third prong of the Martinez inquiry, a plaintiff must receive some direct benefit from the relief granted. In Rhodes v. Stewart, 488 U.S. 1 (1988), for example, the Supreme Court held that two prisoners were not prevailing parties, even though they obtained a declaratory judgment that resulted in the modification of prison policies. The prisoners were unable to reap the benefits of that judgment because one of the prisoners died and the other was released. Id. at 4.

Although a plaintiff must receive some benefit, the benefit need not be substantial. See Farrar, 506 U.S. at

114. In Farrar, the Court held that a plaintiff who received a nominal damage award of only one dollar was still a prevailing party. Id. The Court noted, "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." 506 U.S. at 113.

Given Farrar and Rhodes, a plaintiff is a prevailing party only if the plaintiff shows that it receives some direct benefit, however slight, from the litigation. The Ninth Circuit addressed these tests in Martinez, in which several California cities challenged the state's formula for distributing funds under the older Americans Act, 42 U.S.C. § 3001 et se . The district court enjoined California from using certain factors in its formula, then approved a new formula. Id. Under the court approved formula, however, the cities actually received less money than they had received under the formula they had challenged. Id. at 1422. Pointing out that the cities derived no direct benefit from the result of the litigation, the Ninth circuit held that they were not prevailing parties for purposes of 42 U.S.C. § 1988. Id.

As UFO did not realize any benefit, it does not satisfy the third prong of the Martinez inquiry. The injunction, entered on July 9, 2004, would have allowed parasail operations between December 15, 2004, and May 15, 2005, a time during which Haw. Rev. Stat. § 200-37 would otherwise have prevented such activity. On December 13, 2004, however, two days before the injunction was to have any effect, the court stayed the injunction. Then, on March 31, 2005, the court vacated

the July 9, 2004, order Accordingly, UFO was not allowed to conduct even one additional day of parasail operations as a result of the July 9, 2004, injunction. UFO fails to identify any benefit derived from the July 9, 2004, injunction, or any other order in this case.

UFO contends that, on the issuance of the injunction, it became the prevailing party for purposes of 42 U.S.C. § 1988. At the July 5, 2005, hearing on the present motion, UFO distinguished itself from parties that, like the prisoners in Rhodes, win only declaratory relief. UFO argued that winning an injunction is equivalent to prevailing, even if a declaratory judgment is not. But in any civil action, "the judicial decree is not the end but the means." Rhodes, 488 U.S. at 4. "At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces[.] . . . The real value of the judicial pronouncement . . . is the settling of some dispute which affects the behavior of the defendant towards the plaintiff." Id. (emphasis in original) quoting Hewitt v. Helms, 482 U.S. 755, 761 (1987)). UFO's July 9, 2004, injunction neither produced any change in Defendants' behavior, nor provided UFO with any direct benefit. Accordingly, under Farrar, Rhodes, and Martinez, UFO is not a prevailing party.

UFO contends that Martinez is inapplicable to this case because the cities in Martinez lacked standing. UFO points out that, by contrast, it has standing to bring its claims. The Ninth Circuit in Martinez, however, addressed standing merely as an analogy to explain why the plaintiffs' success in "vindicating [a] general interest in having the government obey the law" was insufficient to confer prevailing party status. 32 F. 3d

at 1422. What the court said was that the plaintiffs would have lacked standing if, at the outset, they had sought to vindicate a generalized interest. The court did not hold that the plaintiffs actually lacked standing to bring their claims, but rather that the success they achieved was not a cognizable benefit under the law. Id.

UFO next compares this case to Balark v. City of Chicago, 81 F.3d 658 (7th Cir. 1996), in which the Seventh Circuit held that injunctive relief was sufficient to confer prevailing party status, despite the subsequent vacating of the injunction order by the court. In that case, however, the injunction remained in place for ten years. During the pendency of that injunction, the plaintiffs in Balark certainly received a direct benefit. In this case, by contrast, the injunction was stayed before it took real effect, and UFO realized no benefit.

V. CONCLUSION.

UFO is not a prevailing party in this case. The court therefore affirms the Magistrate Judge's Recommendation and denies UFO's motion for fees, costs and expenses.

IT IS SO ORDERED.

DATED: Honolulu/ Hawaii, July 7, 2005.

Filed 2/11/2008
No. 05-16545
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UFO CHUTING OF HAWAII, INC., a Hawaii corporation; K.M.B.S., INC., a Hawaii corporation d/b/a Kaanapali Tours,
Plaintiffs-Appellants,

v.

ALLAN A. SMITH, in his capacity as Chair of the Board of Land and Natural Resources, State of Hawaii, and Acting Director of the Department of Land and Natural Resources, State of Hawaii; et al.,
Defendants-Appellees,

UNITED STATES DEPARTMENT OF COMMERCE: et al.,
Defendant-Intervenors-Appellees.

Before: THOMPSON, BERZON, and TALLMAN, Circuit Judges.

Judges Berzon and Tallman have voted to deny the petition for rehearing en banc and Judge Thompson would so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

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(3)

No. 07-1427

SEP 23 2008

IN THE

Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., *et al.*,
Petitioners,

v.

LAURA H. THIELEN, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court consider whether a Hawaii law regulating parasailing is preempted by the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, when that question was neither presented to nor considered by the court of appeals?

2. Are petitioners entitled to attorney's fees pursuant to 42 U.S.C. § 1988 where judgment in their favor was set aside based on a change in federal law before the judgment materially altered the legal relationship between the parties or benefited petitioners in any way?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The petition should be denied for several independent reasons. First, this case does not properly present the questions on which petitioners seek certiorari. Petitioners first ask this Court to review whether the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, preempts Hawaii's seasonal ban on parasailing in certain waters off the coast of Maui. Before the Ninth Circuit, however, petitioners asserted the preemptive effect only of their federal Coast Guard licenses, not of the MMPA. Petitioners then ask the Court to determine whether the enactment of legisla-

tion mooting a final judgment deprives a party of its status as a "prevailing party" for purposes of obtaining attorney's fees under 42 U.S.C. § 1988. But on this question the court of appeals *agreed* with petitioners that subsequent legislation need not deprive a party of its "prevailing party" status. *See* Pet. App. 13a-14a. The court of appeals instead ruled that petitioners were properly denied attorney's fees for a different reason: because they did not receive "a direct and substantial benefit from [their] initial award of a permanent injunction." *Id.* at 14a. Petitioners do not even clearly challenge that holding.

Quite apart from these threshold obstacles to review, the decision below was correct and does not conflict with any decision of another court of appeals. Further review is not warranted.

STATEMENT OF THE CASE

1. In 1990, in part in an effort to protect the mating grounds of endangered humpback whales, the Hawaii legislature passed a statute prohibiting certain activities, including parasailing, in a small area of near-shore navigable waters off the west and south coasts of Maui from December 15 to May 15. *See* Haw. Rev. Stat. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 13-256-112.

Petitioners operate parasailing businesses. Their two parasailing vessels are licensed by the Coast Guard to carry up to twelve passengers in "coastwise" trade on the west coast of Maui. Pet. App. 2a-3a. The State's seasonal ban on parasailing prevents petitioners from conducting their parasailing business in the protected waters from December 15 to May 15. State law does not prohibit petitioners from conducting their parasailing business elsewhere during this period; State law

does not prohibit petitioners from entering the protected waters for activities not covered by the ban; and State law does not prohibit petitioners from conducting their parasailing business in the protected area at other times of the year. *See* Haw. Rev. Stat. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 13-256-112.

2. On November 28, 2003, more than 13 years after the State law became effective, petitioners filed a complaint in the United States District Court for the District of Hawaii seeking a determination on various grounds that the State law was preempted by federal law. Pet. 12.

On July 9, 2004, the district court granted summary judgment for petitioners, solely on the ground that the State's parasailing ban was preempted by the MMPA. *UFO Chuting of Hawaii, Inc.* v. *Young*, 327 F. Supp. 2d 1220, 1229-1230 (D. Haw. 2004). The court issued a permanent injunction barring enforcement of the State law on September 29, 2004 and entered judgment on October 1. Pet. App. 3a. The State appealed to the Ninth Circuit.

3. Congress then passed the Fiscal Year 2005 Omnibus Appropriations Bill, H.R. 4818, which President Bush signed into law on December 8, 2004. Pub. L. No. 108-447, 118 Stat. 2809, 2809. Section 213 clarifies that the MMPA does not preempt Hawaii laws that regulate boating to protect whales. It provides:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of

> humpback whales, to the extent that such law or regulations is no less restrictive than Federal law.

Id. at 2884.

The next day (December 9, 2004), the State filed motions asking the district court to stay the injunction and to indicate whether it would entertain a motion to alter the judgment pursuant to Federal Rule of Civil Procedure 60(b) on remand. On December 13, the court stayed the injunction and indicated its willingness to reconsider the judgment. Pet. 14; Pet. App. 4a.

All this occurred before the State's seasonal ban on parasailing in the protected waters took effect on December 15. Because the district court stayed the injunction before December 15, petitioners were not able to benefit from the injunction by parasailing for even one day of the seasonal ban period.

After a formal remand from the Ninth Circuit and additional briefing,[1] the district court ruled in favor of the State and denied petitioners' request for fees. The court found that Section 213 was constitutional and rendered the parasailing ban no longer preempted by the MMPA. Pet. App. 24a. The court found that petitioners were not entitled to attorney's fees because they had not benefited from the permanent injunction, which the court had stayed before the ban took effect on December 15. *Id.* at 54a-55a.

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[1] Petitioners' additional briefing in the district court included a claim that Section 213 is unconstitutional. The United States intervened to defend the law. The district court rejected the argument. Petitioners did not pursue this issue in the Ninth Circuit.

4. Petitioners timely appealed to the Ninth Circuit. The sole basis for their appeal on the merits was their contention that State law was preempted by the Coast Guard licensing scheme codified at 46 U.S.C. §§ 2101 *et seq.* Petitioners did not appeal the district court's ruling that, in light of the recently enacted Section 213, the MMPA did not preempt State law. *See* Plaintiffs-Appellants' Opening C.A. Br. 18-19 (discussing the preemptive effect of federal licenses, not of the MMPA), *available at* 2005 WL 4155371.

The Ninth Circuit affirmed. The court found that State law did not "completely exclude" UFO's right to operate vessels under its federal maritime coasting licenses "or actually conflict with federal law." Pet. App. 8a. The court also found that the State law was a reasonable and non-discriminatory regulation of the federal licenses. *Id.* at 8a-13a.

As to petitioners' right to attorney's fees under 42 U.S.C. § 1988, the court of appeals acknowledged that the subsequent statutory change created by Section 213 did not by itself prevent UFO from being a "prevailing party." Pet. App. 14a. Nevertheless, "[b]ecause the district court stayed the implementation of the permanent injunction before the State had to change its behavior—before Hawaii stopped enforcing its parasailing ban," the Ninth Circuit determined that UFO had never received "a direct and substantial benefit" from the award of the permanent injunction. *Id.* at 14a-15a. It was on this basis that the court concluded that petitioners could not be considered "prevailing parties" within the meaning of Section 1988.

REASONS FOR DENYING THE PETITION

I. THE MMPA PREEMPTION QUESTION WAS NEITHER PRESENTED TO NOR PASSED UPON BY THE COURT OF APPEALS, IT HAS NOT OCCASIONED ANY CONFLICT IN THE LOWER COURTS, AND THE DISTRICT COURT CORRECTLY RESOLVED IT IN THE STATE'S FAVOR

The petition should be denied first and foremost because it seeks review of a question that was neither presented to nor passed upon by the court of appeals. *See, e.g., City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *Delta Airlines* v. *August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us.").

Petitioners frame their first "Question Presented" as follows:

> Does Hawaii's five-month seasonal ban on parasailing in navigable (federal) waters off Maui's coast violate the Supremacy Clause because it furthers neither the purposes nor the objectives of the federal Marine Mammal Protection Act, 16 U.S.C. § 1379(a), the predominant federal regime enacted by Congress in 1972 for the safety and well being of humpback whales?

Pet. *i*.

Petitioners did not argue this question in the court of appeals. In that court, they acknowledged and did not dispute the district court's ruling that "section 213

altered the preemptive effect of the MMPA by resolving the conflict with the [parasailing] Ban." Plaintiffs-Appellants' Opening C.A. Br. 2 (citing district court decision). The State's answering brief similarly noted that "Plaintiff's only theory on appeal is that State law actually conflicts with their federal coastwise licenses. ... [Although] plaintiffs originally prevailed below on the basis of a conflict with the MMPA ... [t]hey ... do not pursue that claim on appeal." Defendants-Appellees' Answering C.A. Br. 7 & n.5, *available at* 2005 WL 4668591.

Unaccountably, petitioners now try to revive their abandoned MMPA claim in this Court. But petitioners fail to advise this Court that they did not argue the point in the court of appeals. Nor do they explain why this Court should address an issue not briefed or argued to the court of appeals and not discussed in that court's decision.

In any event, even if petitioners had properly preserved their MMPA preemption argument, this Court's review would still be unwarranted. First, petitioners identify no conflict among the lower courts as to the MMPA's preemptive effect, and the State is aware of none.

Second, the district court was correct in holding that Section 213 of the Fiscal Year 2005 Omnibus Appropriations Bill precludes any claim that the MMPA preempts Hawaii's seasonal parasailing ban.

Section 213 provides that "notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and man-

agement of humpback whales." Pub. L. No. 108-447, 118 Stat. at 2884.

"[A]ny other federal law related to the conservation and management of marine mammals" plainly includes the MMPA, the central function of which is to regulate the conservation and management of marine mammals. Just as plainly, the State's seasonal ban on parasailing constitutes a "State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales." In enacting Section 213, as the district court correctly held, Congress thus exempted the State's seasonal parasailing ban from the MMPA's preemptive effect.

Remarkably, petitioners do not even mention Section 213 in the argument section of their petition. Rather than discussing Section 213 and Congressional purpose, "the ultimate touchstone" of preemption, *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks Int'l Ass'n* v. *Schermerhorn*, 375 U.S. 96, 103 (1963)), petitioners attempt to distract the Court with talk of heightened scrutiny for state statutes that conflict with federal fields of interest.

Petitioners once again confuse the issue. The court of appeals discussed the appropriate level of deference to afford state legislatures when reviewing statutes that do *not* conflict with federal law. Pet. App. 8a-9a. That question arose in the context of the only issue before the court—the preemptive effect of the petitioners' Coast Guard licenses. It has nothing to do with the MMPA preemption question petitioners now urge on this Court.

II. The Denial Of Attorney's Fees Involved A Straightforward Application Of This Court's Precedents

In their second question presented, petitioners ask this Court to consider whether "enactment of legislation mooting a judgment ... deprive[s] the prevailing party, here petitioners, of the right to attorney's fees under 42 U.S.C. § 1988." Pet. *i*. But the court of appeals answered that question in petitioners' favor, finding that "the subsequent statutory change" did not by itself "undermine UFO's status as a [potential] prevailing party." Pet. App. 14a. Instead, the court of appeals upheld the denial of attorney's fees for an independent reason:

> [t]he entry of judgment in a party's favor does not automatically render that party a "prevailing party" under § 1988. *Rhodes v. Stewart*, 488 U.S. 1, 3, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988) (per curiam). The judgment is not the end but a means to receiving some redress from the defendant. *Id.* To be considered a "prevailing party," the plaintiff must show that the judgment somehow affected the behavior of the defendant towards the plaintiff.

Pet. App. 14a. Because the injunction was overturned two days before it would have taken effect, the court held, petitioners "did not receive a direct benefit" from it. *Id.* at 15a.

The petition does not clearly challenge that basis for the denial of a fee award. And petitioners' claims of a circuit conflict are without merit because they rest on a similarly confused view of the relevant legal question. In each of the cases petitioners cite as evidence of such a conflict, the plaintiffs were found to be entitled to at-

torney's fees precisely because, unlike petitioners here, they actually enjoyed substantial benefits from the initial remedies they achieved even though those remedies were later overturned or rendered moot.

In *Watson* v. *County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), for example, the plaintiff obtained a preliminary injunction prohibiting introduction of certain evidence in an administrative proceeding. Although he lost the case two years later, by the time the case was resolved, "the administrative hearing had long since come and gone," *id.* at 1094, and the preliminary injunction had successfully prevented introduction of the evidence the plaintiff had sought to keep out.

In *Balark* v. *City of Chicago*, 81 F.3d 658 (7th Cir. 1996), the plaintiffs obtained a consent decree that controlled how the city had to pay out tort judgments for ten years before it was dissolved.

In *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982), the plaintiffs attained the "temporary and provisional relief" that was the "primary object" of their appeal. *Id.* at 601. Similarly, in *Hyundai Motor America* v. *J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915 (E.D. La. 1991), the plaintiffs obtained "the primary relief sought," first through a preliminary injunction barring the state from holding certain administrative proceedings in a manner the plaintiffs claimed was biased against them and then through state legislation doing away with the objectionable feature of the proceedings. *Id.* at 917.

Finally, in *Gerling Global Reinsurance Corp. of America* v. *Garamendi*, 400 F.3d 803, *amended on other grounds*, 410 F.3d 531 (9th Cir. 2005), the Ninth Circuit applied exactly the standard applied here in finding that the plaintiffs were entitled to attorney's

fees. Because they had "directly benefited" from an injunction barring the State from enforcing a statute requiring insurance companies to provide certain information, they had prevailed and merited an award of attorney's fees. *Id.* at 806-807.

In each of these cases, the plaintiffs benefited from the relief they sought, for at least some period. Here, by contrast, the short-lived injunction never required the State to alter its behavior towards petitioners, and petitioners thus received no benefit from it. The court of appeals, like the district court, was thus correct in ruling that they were not entitled to attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008

Supreme Court, U.S.
FILED
OCT 23 2008

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Hawaii's five-month ban on parasailing during humpback whale mating season in navigable waters off the coast of Maui is preempted by the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*

2. Whether petitioners are "prevailing parties" eligible for attorney's fees under 42 U.S.C. 1988 where the district court stayed its permanent injunction entered in favor of petitioners before the injunction took effect and subsequently vacated that injunction and entered final judgment against petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 508 F.3d 1189. An order of the district court (Pet. App. 39a-49a) is reported at 380 F. Supp. 2d 1160. Other orders of the district court (Pet. App. 20a-38a, 50a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2007. A petition for rehearing was denied on February 11, 2008 (Pet. App. 57a). The petition for a writ of certiorari was filed on May 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Hawaii (State) prohibits parasailing and certain other boating activities in areas off the western and southern shore of the Island of Maui during the humpback whale mating season, a five-month period from December 15 to May 15. See Haw. Rev. Stat. Ann. §§ 200-37(i), 200-38(c). Petitioners own parasailing businesses in Maui that operate in waters covered by that seasonal prohibition.

1. In November 2003, petitioners filed suit challenging the State's seasonal parasailing ban. Petitioners' second amended complaint alleged, *inter alia*, that the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, preempted the State's ban because the MMPA, as is relevant here, provides that

> [n]o State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species * * * of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species * * * to the State.

16 U.S.C. 1379(a). See C.A. E.R. 295, 300. The district court agreed, granted summary judgment to petitioners, and, on September 29, 2004, issued a permanent injunction enjoining the State from enforcing the seasonal ban. *Id.* at 328-350, 369-370. In the absence of that injunction, petitioners' parasailing operations off Maui would have been prohibited under State law at the start of the next seasonal ban on December 15, 2004.

On December 8, 2004, while the State's appeal to the Ninth Circuit was pending, the President signed into law the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809. Section 213 of that act provides:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

118 Stat. 2884.

The State promptly moved the district court to stay its injunction and, on December 13, 2004—two days before the seasonal parasailing ban was to take effect—the district court stayed its injunction pending appeal. C.A. E.R. 405-406. The court of appeals subsequently ordered a partial remand of the State's appeal for the limited purpose of enabling the district court to consider the State's request for post-judgment relief under Fed. R. Civ. P. 60(b). C.A. E.R. 412-413.

The State moved for relief from judgment on the ground that Section 213 now authorized the State's parasailing prohibition; petitioners opposed relief on the ground that Section 213 violated separation of powers principles; and the United States intervened to defend the statute's constitutionality. On May 5, 2005, the district court granted the State's motion for post-judgment relief and vacated its injunction, holding that Section 213 was constitutional and "expressly authorize[d]" the parasailing ban. Pet. App. 25a; *id.* at 24a-36a. The court of appeals subsequently granted the State's motion to dismiss its appeal. C.A. E.R. 464-465.

On July 7, 2005, the district court granted summary judgment to the State on petitioners' remaining claims

by, *inter alia*, rejecting petitioner's contention that the parasailing ban conflicts with and was preempted by documents issued by the United States Coast Guard, which certify petitioners' vessels for use in "coastwise" trade along the Maui coast. *Id.* at 45a-49a.[1] The court denied petitioners' motion for attorney's fees, holding that petitioners were not "prevailing parties" who might obtain a fee award. *Id.* at 50a-56a.

2. The court of appeals affirmed. Pet. App. 1a-19a. It held that the State's seasonal parasailing ban did not conflict with and was not preempted by petitioners' Coast Guard certificates for their vessels because the ban did not constitute a total exclusion of coastwise trade, prohibits parasailing but not other forms of passenger-related commerce, and applies during only five months of the year. *Id.* at 5a-8a. The court further held that the seasonal ban was a reasonable, nondiscriminatory conservation measure that survived rational-basis review because it furthered a legitimate government interest within the State's police powers. *Id.* at 8a-13a. The court of appeals did not address whether the parasailing ban was preempted by the MMPA or whether

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[1] The Coast Guard has issued Certificates of Documentation and Certificates of Inspection for two vessels owned by petitioners. C.A. E.R. 96-101. A Certificate of Documentation serves as evidence of a vessel's nationality and its "qualification to engage" in a specified trade such as coastwise trade. 46 U.S.C. 12134 (2006); see 46 U.S.C. 12105(a), 12112(a)(3) and (b) (2006); 46 C.F.R. 67.1, 67.19(a). The Certificates of Inspection, in turn, reflect that petitioners' vessels may carry 12 passengers each and have met "applicable vessel inspection laws and [associated] rules and regulations." C.A. E.R. 98, 100.

Section 213 was constitutional because petitioners failed to renew those challenges on appeal.[2]

The court of appeals also affirmed the district court's denial of attorney's fees on the ground that petitioners were not "prevailing part[ies]" within the meaning of 42 U.S.C. 1988. Pet. App. 13a-15a. The court explained that, to achieve "prevailing party" status, a plaintiff must obtain relief that "materially alters the legal relationship between the parties" in a manner that "directly benefits the plaintiff," and therefore must "show that the judgment somehow affected the behavior of the defendant towards the plaintiff." *Id.* at 13a-14a (citations omitted). The court of appeals thus concluded that petitioners did not qualify as prevailing parties because the district court stayed its (now vacated) injunction before the State's seasonal ban began on December 15, 2004, such that the injunction did not alter the parties' conduct in a manner that might have benefitted petitioners. *Id.* at 15a.

ARGUMENT

The court of appeals correctly concluded that the State's seasonal ban on parasailing off the coast of Maui is not preempted by federal law and that petitioners are not "prevailing parties" eligible to receive an award of attorney's fees. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners contend that the MMPA reflects the federal government's "pervasive role" in protecting "all

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[2] Because the United States intervened solely to defend the constitutionality of Section 213 from petitioners' separation-of-powers challenge, which petitioners abandoned on appeal, the United States did not file a brief or otherwise participate in the court of appeals.

marine mammals, including humpback whales," Pet. 19, and that Section 1379(a) "[c]onfirm[s]" that exclusive federal role by "explicitly" preempting state law relating to the taking of marine mammals unless the federal government has transferred relevant authority to a state. Pet. 20. Petitioners therefore conclude that the MMPA preempts state regulation regarding "the health and well being of marine mammals" under the doctrines of express preemption and field preemption. *Ibid.*; see Pet. 18-25. Petitioners' contentions are meritless.

First, this case does not properly present the question whether the MMPA preempts the State's seasonal parasailing ban because petitioners did not raise the question on appeal and the court of appeals did not pass upon it. Petitioners abandoned the argument on appeal and, under this Court's "traditional rule," matters not pressed or passed upon below are not properly subject to review by writ of certiorari. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (citations omitted).

Moreover, petitioners' argument is unavailing on its merits. "Congressional intent is the 'ultimate touchstone' in any preemption analysis," Pet. 18, and Congress made plain in 2004 that—"notwithstanding *any* other Federal law related to the conservation and management of marine mammals"—the "State of Hawaii may enforce *any* State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales," so long as it imposes obligations no less restrictive than federal law. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 213, 118 Stat. 2884 (emphasis added). Whatever the preemptive scope of the MMPA in other contexts, Congress has expressly authorized the State in this case to

enforce its seasonal parasailing ban and similar prohibitions protecting humpback whales "notwithstanding" the MMPA.[3]

2. Petitioners' argument (Pet. 26-29) that they qualify as "prevailing parties" eligible for attorney's fees is also without merit. It is well settled that a litigant must succeed on some "significant issue in litigation which achieves some of the benefit [it] sought in bringing suit"

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[3] Petitioners' reply brief filed in response to the State's brief in opposition asserts that petitioners' argument "is grounded on the ban's effect on the right of coastwise navigation secured by Petitioners' federal licenses [issued by the Coast Guard], not any preemptive effect of the MMPA itself." Reply 4. That position cannot be squared with the question presented or the body of the petition. The relevant question presented, as framed by petitioners, is whether the State's seasonal parasailing ban "violate[s] the Supremacy Clause because it furthers neither the purposes nor the objectives of the federal Marine Mammal Protection Act." Pet. i. Petitioners' list of relevant statutory provisions therefore includes provisions of the MMPA and no provisions regarding documentation for vessels issued by the Coast Guard. Pet. 2-7. The petition's argument likewise focuses on the purported preemptive effect of the MMPA and petitioners' view that this Court's decision in *United States* v. *Locke*, 529 U.S. 89 (2000), requires the presumption that "the federal presence over the management and preservation of humpback whales in navigable waters is dominant" and precludes the state's ban unless that ban satisfies a "higher level of [judicial] scrutiny," Pet. 23. See Pet. 18-25. Although the petition briefly mentions Coast Guard documentation for petitioners' vessels, it does so only in the context of explaining that the court of appeals' purported misapplication of *Locke* "also infected" its evaluation of whether the ban was a reasonable, nondiscriminatory exercise of the State's police power. Pet. 24-25. Nowhere does the petition argue that such federal documentation preempts the State's ban. Indeed, while the Certificates of Documentation and Inspection issued by the Coast Guard for petitioners' vessels reflect that the vessels are qualified to be employed in coastwise trade and have met applicable inspection requirements for their use off Maui, see p. 4 note 1, *supra*, they do not preempt the State's seasonal restrictions on parasailing.

in order to qualify as a "prevailing party." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted) (emphasis added). Indeed, a "plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail," and that court-ordered relief must effectuate a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 (2001) (citations omitted). A plaintiff will therefore qualify as a prevailing party "if, and only if," it obtains judicial relief that "affects the behavior of the defendant toward the plaintiff." *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam).

In this case, although petitioners initially obtained an injunctive order, the district court stayed that order before it might affect the legal relationship of the parties. The district court then vacated the injunction enjoining the enforcement of the State's ban before the injunction could alter the State's enforcement efforts. The State never changed its behavior as a result of judicial relief in this case, and petitioners ultimately obtained no reprieve from the State's seasonal parasailing ban. The court of appeals thus correctly concluded that petitioners were not "prevailing parties." Pet. App. 14a-15a; cf. *Sole* v. *Wyner*, 127 S. Ct. 2188, 2196 (2007) (holding that party who obtains preliminary injunction temporarily altering the parties' legal relationship is not a "prevailing party" if the preliminary injunction "is reversed, dissolved, or otherwise undone by the [court's] final decision").

Petitioners cite no contrary authority holding that prevailing party status may be based on a vacated judgment that never altered the defendant's conduct. Pet. 28. They instead rely on inapposite decisions either ad-

vancing legal theories subsequently rejected by this Court[4] or involving parties that arguably obtained some degree tangible of judicial relief.[5] Further review is therefore unwarranted.

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[4] Compare *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982) (basing prevailing party status on issuance of injunction pending appeal of denial of temporary restraining order even though suit became moot before injunction took effect), with *Rhodes*, 488 U.S. at 4 (judgment ordering action by defendant that became moot before it could take effect did not confer prevailing party status on plaintiffs); compare also *Hyundai Motor* v. *J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915, 919-920 (E.D. La. 1991) (applying catalyst theory), with *Buckhannon*, 532 U.S. at 605 (rejecting catalyst theory).

[5] See, *e.g.*, *Gerling Global Reinsurance Corp.* v. *Garamendi*, 400 F.3d 803, 806 (9th Cir. 2005) (plaintiffs obtained permanent injunction providing "all of the relief they sought in their lawsuit" and "materially alter[ing] the legal relationship between the parties" (citation omitted)); *Balark* v. *City of Chicago*, 81 F.3d 658, 662 (7th Cir.) (plaintiffs obtained consent decree affecting defendant's conduct for more than a decade), cert. denied, 519 U.S. 1006 (1996). Petitioners also rely on two cases that based prevailing party status on the entry of a preliminary injunction that briefly altered the defendant's conduct before the case became moot prior to final judgment. See Pet. 28 (citing *Watson* v. *County of Riverside*, 300 F.3d 1092, 1095 (9th Cir. 2002) (preliminary injunction prevented use of arrest report in administrative hearing), cert. denied, 538 U.S. 923 (2003), and *Hyundai Motor*, 775 F. Supp. at 917-919 (preliminary injunction "provided the plaintiffs with the relief they sought for the pertinent period of time")). Even assuming *arguendo* that the Court's recent decision in *Sole* does not affect the vitality of such decisions, both cases involved plaintiffs who, unlike petitioners, obtained judicial relief temporarily altering the defendant's conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

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(4)

No. 07-1427

Supreme Court, U.S.
FILED
OCT 2 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., A HAWAII CORPORATION, AND K.M.B.S., INC., A HAWAII CORPORATION D/B/A KAANAPALI TOURS, PETITIONERS

v.

ALLAN A. SMITH, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND NATURAL RESOURCES, STATE OF HAWAII; STEPHEN THOMPSON; AND ED UNDERWOOD, ADMINISTRATOR OF THE DIVISION OF BOATING AND OCEAN RECREATION, DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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Pursuant to Sup. Ct. R. 15.6, Petitioners UFO Chuting of Hawaii, Inc. and K.M.B.S., Inc. (hereinafter "Petitioners") reply as follows to the new points raised in the brief in opposition filed by Respondents Laura H. Thielan, et al. (hereinafter "Opposition Brief").

STATEMENT OF POINTS IN REPLY

1. State law prohibits Petitioners from conducting parasailing business elsewhere in Hawaii. They lack permits required by State law to conduct parasailing on Oahu or Hawaii, the only islands having designated parasailing operating areas open between December 15 and May 15.

2. Petitioners' reference to the federal interest reflected by the Marine Mammal Protection Act ("MMPA") was intended to sharpen the Supremacy Clause question, a question fully litigated below, by negating the mistaken view of the appellate court that "non-preemption" was to be assumed because the ban involved a field traditionally occupied by the states.

3. It is the character of a final judgment, not its eventual effect, that determines eligibility for attorney's fees under section 1988. Tying fees to a fortuitous postjudgment circumstance, as did the court of appeals here, undermines the remedial purposes of the statute.

DISCUSSION

I. THE EFFECT OF THE FIVE MONTH BAN IS COMPLETE.

Respondents assert Petitioners are not prevented "from conducting their parasailing business elsewhere during this period [from December 15 to the following May 15]." Opposition Brief at 2. The assertion is false. Haw. Rev. Stat. § 200-37(d) expressly prohibits parasailing "on or above the waters of the State, except on or above areas and during time periods designated by the department." The "Lahaina-Kaanapali Offshore restricted area" is the single parasailing operating area designated by the department for the ocean waters offshore of the island of Maui. Haw. Admin. R. § 13-256-108(b).[1] The area is subject to the seasonal ban. *Id.*

A separate commercial permit is required to conduct parasailing in the two other parasailing operating areas designated by the department. Haw. Admin. R. § 13-256-19(a)(2).[2] The record does not

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[1] Subsection (b), "Restrictions," provides in relevant part:

> The Lahaina-Kaanapali Offshore restricted area is designated as a parasailing area. . . . This area shall be closed to parasailing operations from December 15 to May 15 of the following year.

[2] Haw. Admin. R. § 13-256-19(a)(2) provides:

> No commercial parasailing vessel shall operate on the waters of the State unless the owner has applied for and been issued a commercial operating area use permit for a designated parasail operating area, in addition to any

support Respondents' assertion that a permit would be available were Petitioners willing to relocate their businesses to another island.[3]

Respondents desire to depreciate the effect of the ban on Petitioners' vessels is understandable. A measure that regulates could be viewed more charitably than one that is prohibitory.[4] But that does not give Respondents license to misstate the effect of the ban on Petitioners' vessels.

II. THE SUPREMACY ISSUE PRESENTED BY THE PETITION WAS LITIGATED AND WRONGLY DECIDED BELOW.

Respondents parse the question presented and conclude it was "neither presented to nor passed upon by the court of appeals." Opposition Brief at 6. They misunderstand the wording of the first question. Rather than attempting to revive the MMPA claim, Petitioners cite the act as evidence of the important if

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commercial use permit required for state-owned facilities.

[3] The other designated operating areas include waters offshore of Maunalua Bay boat ramp on the island of Oahu, and waters within Kailua Bay on the island of Hawaii. Haw. Admin. R. §§ 13-256-88 and 155. The department's regulations authorize two operating permits for each area. *Id.*

[4] Once the line is crossed, as in this case, the burden shifts to the state to show that nothing short of a total ban would provide whales with protection beyond that currently afforded under federal law while within the Hawaiian Islands Humpback Whale National Marine Sanctuary. *See e.g.* 16 CFR § 922.184, which prohibits vessels from approaching within 100 yards of a humpback whale within the sanctuary.

not paramount interest of the national government in protecting migratory marine mammals. The argument in support of the petition, as Respondents acknowledge, is grounded on the ban's effect on the right of coastwise navigation secured by Petitioners' federal licenses, not any preemptive effect of the MMPA itself. Respondents do not deny this issue was litigated below.

Protection of marine mammals underlies the purposes and objectives of the MMPA. Petitioners referenced the MMPA in the first question to underscore the point that preemption analysis in the context of a case such as this case not begin with an assumption of non-preemption. The ban is preempted because MMPA's purposes and objectives can be achieved by measures short of an absolute ban such as limits on the speed at which they operate, the approach recently embraced by National Marine Fisheries Service to protect North Atlantic Right Whales from collisions with vessels longer than 65 feet. *See* Final Environmental Impact Statement to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales, National Marine Fisheries Service (August 2008), which may be found at .

By assuming "non-preemption" the court of appeals disregarded *United States v. Locke*, 529 U.S. 89, 106-109 (2000) and required Petitioners to prove an exclusion of "only five months" rendered operation of their vessels "wholly economically infeasible." *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1194 (9th Cir. 2007). The petition makes clear that in light of *Locke* the court of appeals was wrong in beginning (and ending) its analysis with such assumption and by not requiring the State to show that regulation short of a

ban of the operation of Petitioners' vessels would not protect migrating humpback whales. Petitioners respectfully submit the Supremacy Clause question is fairly presented.

III. PETITIONERS' ELIGIBILITY FOR FEES IS DETERMINED BY CHARACTER OF THE FINAL JUDGMENT, NOT ITS SUBSEQUENT EFFECT ON RESPONDENTS.

Respondents appear to concede Petitioners' status as prevailing parties on entry of final judgment in their favor. They posit, however, that such status is contingent on postjudgment events. The argument conflates the alternate predicates for a fee award - - entry of an order that establishes "***entitlement*** to some relief on the merits of his claim" or a response to the suit outside the courtroom that affords the relief sought. *Compare Hanrahan v. Hampton*, 446 US 754, 757, 100 S.Ct. 1987, 1989 (1980) and *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 600 (1st Cir. 1982) (discussing application of the "catalyst" test to the "more difficult question presented by parties that do not win on any significant issue in court but obtain what they seek anyway.").

Hanrahan makes clear fees may be awarded to the prevailing party even before entry of a remedial order such as the permanent injunction present in this case. It suffices that an order has been entered that "determines substantial rights of the parties." *Hanrahan v. Hampton, supra.* On that basis then circuit judge Stephen Breyer cautioned that entitlement to relief does not turn on the presence or

absence of a fortuitous postjudgment circumstance:

> We are reinforced in this view by the language of the Supreme Court in Hanrahan, supra. The Court stated that Congress authorized awards 'to a party who has established his entitlement to some relief on the merits of his claim.' ***A party, in other words, prevails in a law suit when he establishes a legal entitlement to what he seeks, not when what he seeks is actually delivered.***

Coalition for Basic Human Needs, supra (citations omitted; emphasis supplied).

Petitioners won an enforceable judgment that altered the legal seascape. The decision of the court of appeals that prevailing party status turns on subsequent events directly conflicts with *Hanrahan* and its progeny, and should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted as to both the preemption and attorney's fee questions.

Respectfully submitted.

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(6)

No. 07-1427

Supreme Court, U.S.
FILED
OCT 29 2008
OFFICE OF THE CLERK

IN THE

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF TO FEDERAL RESPONDENTS

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STATEMENT OF POINTS IN REPLY

1. The Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* (the "MPPA") illustrates the misconception of the lower courts that protection of pelagic marine mammals involved a field traditionally occupied by the states and provides context for evaluating the putative justification for the seasonal ban of Petitioners' vessels.

2. It is the character of a final judgment that determines eligibility for attorney's fees under 42 U.S.C. § 1988 ("Section 1988"). Tying fees to a fortuitous postjudgment circumstance, as did the courts below, undermines the remedial purpose of the statute.

DISCUSSION

I. THE SUPREMACY CLAUSE QUESTION IS FRAMED ADEQUATELY.

Federal Respondents join their state counterparts in questioning whether the first question presented subsumes the Supremacy Clause issue that arises from the conflict between the seasonal ban of Petitioners' vessels and their federal rights of coastwise navigation. FR Brief at 7 n.3. The contention is misplaced.

Protection of a single species of marine mammal was the putative purpose of the five month ban of the operation of Petitioners' vessels. *Locke v. United States*, 529 U.S. 89, (2000) ("*Locke*") required the courts below to balance the extent to which the ban actually contributes to the protection of humpback whales

against the operating rights Petitioners enjoy under their federal licenses. Instead, the lower courts presumed the ban reasonable and placed on Petitioners a burden of proof ill-suited to the task.

Those courts, as well as Federal Respondents, misunderstand that vessels operating under federal licenses of the sort held by Petitioners enjoy federal rights of navigation that this Court long ago ruled trump conflicting state regulation. *See Gibbons v. Ogden,* 22 U.S. 1, 221 (1824) (finding State law inhibiting the use of steam to power a vessel "having a license under the act of Congress, comes, we think, in direct collision with that act"). That Petitioners' vessels were similarly licensed was never in dispute. This supplied the predicate for their reliance on *Locke* in making the argument that the lower courts employed the wrong paradigm in upholding the ban as a reasonable exercise of the state's subordinate power to regulate the operation of licensed vessels on navigable waters. Preemption analysis, as that case makes clear, does not begin with an assumption of no conflict, particularly where a state regulatory measure affects federally licensed vessels to the extent of the seasonal ban. The MMPA is relevant to that analysis because it provides a standard for measuring the state's conclusion that nothing short of a total ban of Petitioners' vessels would bring an incremental increase in the protection already afforded whales under federal whose necessity outweighs impact. Petitioners submit the first question of the petition adequately raises the preemption issue that clearly exists in view of *Locke.*

II. PETITIONERS' ENTITLEMENT TO FEES IS DETERMINED BY THE RELIEF CREATED BY THE FINAL JUDGMENT.

Federal Respondents' opposition rests on the flawed premise that "prevailing party" status may be lost as a result of a change in law occurring after entry of final judgment. No prior decision, whether of this Court or any lower court, has so held. As for the "well-settled" principle attributed to *Hensley*, the issue there was not entitlement but the amount of fees where an applicant achieves "only limited success." *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983).

In alluding to "a typical formulation" of the prevailing party standard, this Court referred to some success which advances a purpose of the litigation. *Id.* at 433, 1939. That formulation, however, should not be read as exclusive and certainly not as conditioning prevailing party status on actual enforcement of the judgment. Doing so adds a gloss to the common understanding of the term "prevailing party" that disserves the salutary purpose of Section 1988.

Hensley notes the standard for determining whether a fee applicant is a "prevailing party" has been framed variously to take account of the different ways in which a party may be said to prevail. *Id.* But *Buckhannon* affirms what Petitioners argued below. *Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health & Human Res.*, 532 U.S. 598 (2001). Congress in using the term "prevailing party" intended to qualify for fees those parties who win their cases, a standard characterized by common understanding and unaffected by post-judgment changes in the law.

In designating those parties eligible for an award of litigation costs, Congress employed the term

"prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded in certain cases, the court will award attorney's fees to the prevailing party. Also termed *successful party*." This view that a "prevailing party" is one who has been *awarded* some relief by the court can be distilled from our prior cases.

> . . . .
>
> ***In addition to judgments on the merits***, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees.
>
> . . . .
>
> . . . These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees ***create*** the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees.

Buckhannon Bd. and Care Home, Inc. v. West Va. Dept. of Health & Human Res., 532 U.S. 598, 603-604 (2001) (second and third emphasis supplied; citations omitted).

The operative phrase is "create." A final judgment on the merits "creates" the requisite change in the parties' legal relationship, and thus serves as the basis for a fee award. *Id.* The federal government does not deny that Petitioners were prevailing parties on entry of final judgment. They enjoyed that status when they applied for fees. Actual outcome may be important in deciding whether a preliminary injunction or consent decree provides the predicate for fees. But

until this case the common understanding of "prevailing party" was "the party that wins the suit or obtains a finding (or an admission) of liability." *Id.* at 615 (Scalia, J., concurring). The panel clearly erred in assigning a different meaning to the phrase.

Nothing in *Sole v. Wyner*, 127 S.Ct. 2188 (2007) is to the contrary. There the fee applicant won a preliminary injunction but lost on the merits. *Id.* at 2190. The district court, after opportunity to develop a record, rejected the premise on which it had granted preliminary relief -- that a screen would protect the public from unwanted views of nudists -- and granted the city summary judgment. *Id.* at 2196. The preliminary injunction adjudicated nothing.

On these facts, the court viewed the preliminary ruling as ephemeral and not qualifying applicant as a "prevailing party." *Id.* Left open was the question "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.* In contrast here, Petitioners had in hand a final decision on the merits of a claim for permanent injunctive relief at the time they applied for fees.

This Court has not had occasion to decide whether the policy underlying the fee-shifting statute warrants revisiting the common understanding of the term "prevailing party." The petition should be granted to correct the panel's view that prevailing party status is lost as a result of a post-judgment, post-fee application change in law, a decision that is at variance with the common understanding of "prevailing party," and which disserves the purpose of Congress in adopting section 1988.

CONCLUSION

The petition for a writ of certiorari should be granted as to both the preemption and attorney's fee questions.

Respectfully submitted,

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(2)

No. 07-1427

FILED

JUN 16 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE OCEAN TOURISM COALITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May state regulation totally prohibit the free navigation of federally licensed vessels for five months of the year without violating the Supremacy Clause?

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Supreme Court Rule 37 1

IDENTITY AND INTEREST OF AMICUS CURIAE OCEAN TOURISM COALITION

Amicus curiae Ocean Tourism Coalition (OTC) respectfully submits this brief in accordance with Supreme Court Rule 37.[1]

OTC is the only statewide commercial boating organization in Hawaii, and represents approximately 300 charter and tour boat companies serving the ocean tourism industry. Although OTC's members are typically small businesses with less than ten employees, they accommodate visitors from all fifty states and many foreign nations, and virtually all of its members operate vessels in the coastwise trade in federally navigable waters under federal licenses. For example, OTC's members operate inter-island cruise ships, 149 passenger sail and dinner cruise boats, submarines, and charter fishing boats. Nationally, the parasailing industry alone accounts for approximately $200 million of gross revenues and employs more than 2,000 people. The overwhelming majority of the customers of Hawaii's parasailing business –

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[1] All counsel of record consented to the filing of this brief, and received notice of amicus's intention to file this brief at least ten days before this brief was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus curiae made a monetary contribution toward the preparation or submission of this brief. Petitioner is a member of OTC, but was excluded from any role in the decision to authorize this brief and did not, and will not, make any monetary contribution towards its preparation or submission.

98% – are visitors from other states and foreign countries.

The State of Hawaii's total prohibition on parasailing in the federally navigable waters off of Maui for five months of the year will have a devastating impact on many of OTC's members, and the ruling by the court below will likely have the effect of putting them out of business at a time when rising gas prices and the bankruptcies of two of Hawaii's major air carriers has severely affected the Hawaii tourism industry – an industry on which the State depends.

SUMMARY OF ARGUMENT

In affirming the dismissal of Petitioners' claims, the Ninth Circuit held that a state's complete exclusion of federally-licensed vessels from navigable waters was permissible since it did not ban the vessels year-round. The Court of Appeals determined that because Hawaii only bans parasailing in waters off the coast of Maui for five months of each year, the prohibition is not a "complete exclusion" of federal licensed coastwise navigation and was therefore permissible. After this Court's decision in *United States v. Locke*, 529 U.S. 89 (2000), which held that a "comprehensive scheme of [federal] regulation preempted more restrictive state regulations, the states, not waiting for the federal government to act, enacted regulations to address perceived shortcomings in federal law. Shippers, boaters, and owners of

federally licensed vessels, such as Petitioner and Amicus, are now subject to a patchwork of overlapping and conflicting federal and state regulations.

ARGUMENT

I. THIS COURT'S INTERVENTION IS NEEDED TO PRESERVE UNIFORM NATIONAL LAWS REGULATING COASTAL WATERS.

The issue presented by the Petition is of pressing national importance. With the increasing federal presence in the nation's ports after the September 11, 2001 terrorist attacks, delineating the boundaries between federal and state authority to regulate interstate and foreign commerce in coastal waters is crucial. For over 200 years, the regulation of maritime commerce and navigation has been a fundamentally federal concern. The ability of the States to regulate coastal waters has always been circumscribed by the federal government's paramount interest in regulating maritime trade. Until the decision of the Ninth Circuit below, a licensee's right to freely navigate while sailing under a federal coastwise license had been unquestioned. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ("The acts of the Legislature of the State of New-York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State . . . are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as

the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam."); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 273 (1977) ("The basic form for the comprehensive federal regulation of trading and fishing vessels was established in the earliest days of the Nation and has changed little since.").

In *United States v. Locke*, 529 U.S. 89, 99 (2000), this Court held "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, is cited in the Federalist Papers as one of the reasons for adopting the Constitution." Consequently, the Court invalidated the State of Washington's attempt to regulate the operations of tankers to prevent oil spills, holding that, because federal regulation of oil tankers was "comprehensive," the states were prohibited from enacting more stringent regulations. *Id.* at 116-17 ("The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate."). After *Locke*, the question remained whether a less "comprehensive scheme of [federal] regulation" would similarly preempt state attempts to impose more stringent regulations on areas of traditional federal authority. Even where the federal government has undertaken efforts to enact nationwide regulations, the states have enthusiastically

entered that void, resulting in a patchwork of overlapping and potentially conflicting regulations.

A. STATES ARE REGULATING BALLAST WATER ON SHIPS EVEN AS THE FEDERAL GOVERNMENT CONSIDERS REGULATIONS.

For example, maritime commerce, particularly from foreign waters, is increasingly seen as a threat vector for invasive species, and the pressure is on both the state and federal governments to regulate this area. The House of Representatives recently approved the Ballast Water Treatment Act of 2008, a bill requiring certain technology on vessels to prevent invasive species. *See* H.R. 2830, 110th Cong., Title V, §§ 501-507.[2] The United States Coast Guard was recently sued to compel it to pass similar ballast water regulations. "Environmentalists Sue as Virus Aims at Lake Superior's Fish," THE STAR-TRIBUNE, May 1, 2008, *available at* www.startribune.com/local/18436694.

While Congress and federal agencies work to enact a uniform nationwide regulatory scheme, however, several states, including Michigan, Hawaii and California, have not waited for the federal government to act, and have enacted regulations requiring

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[2] The International Maritime Organization ("IMO") is involved in efforts to combat the problem as well. *See* "The IMO Guidelines," *available at* http://globallast.imo.org.

extensive prophylactic measures for vessels making port calls in their ports. *See, e.g.*, Mich. Comp. Laws § 324.3112(6) (Supp. 2008) (requiring all oceangoing vessels engaging in port operations to obtain a permit which shall be granted only if the applicant can demonstrate that the vessel will not discharge aquatic nuisance species); Haw. Rev. Stat. § 187A-32 (Supp. 2007) (authorizing rules to prevent the introduction and carry out the destruction of aquatic organisms through the regulation of ballast water discharges); Cal. Pub. Resources Code §§ 71200-71217 (2008) (comprehensive legal and regulatory authorization to remove nonindigenous species from California waters). Indeed, despite the *Locke* decision, several courts have declined to invalidate state efforts to regulate ballast waters.

Recently, the District Court for the Eastern District of Michigan refused to invalidate a Michigan statute which regulates ballast water on foreign vessels. *Fednav, Ltd. v. Chester*, 505 F. Supp. 2d 381 (E.D. Mich. 2007). *See also Northwest Envtl. Advocates v. Envtl. Protection Agency*, 2006 U.S. Dist. Lexis 69476, at *45 (N.D. Cal. 2006) (enjoining the federal government to pass Clean Water Act regulations within two years to address invasive species). Similarly, a Minnesota state court ordered the State of Minnesota Pollution Control Agency to draft ballast water regulations to prevent a viral disease borne by invasive species. *See* "Lake Superior Ballast Water Must Be Regulated Judge Says MPCA Must Act to Halt Fish-Killing Virus," ST. PAUL PIONEER PRESS, April 23, 2008, at B1.

B. STATES AND EVEN COUNTIES ARE PURPORTING TO REGULATE NAVIGATION TO PROTECT ENDANGERED SPECIES.

Hawaii's parasailing ban is not the only state regulation of commerce and navigation intended to protect marine mammals that infringes on federal coastwise law. During the pendency of the National Oceanic and Atmospheric Administration's rulemaking project to create regulations governing the standards for approaching orca in Puget Sound, the State of Washington and San Juan County each enacted legislation that purported to limit the ability of vessels to freely navigate in order to protect orca. *See* H. Bill 2514, 60th Leg. (Wash. 2008) (enacted). The Washington State legislature determined that "the federal government has initiated the process to adopt the orca conservation rules, but *this process may be lengthy*." *Id.* § 1 (emphasis added). Similarly, San Juan County purports to regulate "the operation of vessels in proximity to the southern resident killer whale." *See* San Juan Washington County Ord. No. 35-2007, *available at* http://www.sanjuanco.com/council/docs/ordinances/2007/Ord%2035-2007_0001.pdf. There, the San Juan County Council determined that "more clear, understandable and enforceable standards are desired to regulate vessel operation in proximity to the southern resident killer whale" and "San Juan County has been informed that the [federal rulemaking] . . . is likely to take some time to complete. . . ." *See id.* In other words, a local government has decided that the federal government's regulations are

insufficient, and the process for enacting those regulations is taking too long.

C. STATES ARE ATTEMPTING TO REGULATE FUELS USED BY OCEANGOING VESSELS IN FOREIGN TRADE.

Concerns with the air pollution caused by the type of fuel used by some large oceangoing vessels have prompted several states to implement or consider banning the use of such fuels. *See* H.B. 2919, 24th Leg. (Haw. 2008) *available at* www.capitol.hawaii.gov/session2008/Bills/HB2919_.pdf. The Ninth Circuit recently addressed one such initiative to regulate fuels when it struck down the Port of Long Beach, California's ban. *See Pacific Merchant Shipping Ass'n v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008) (California's fuel regulation preempted by Clean Air Act).

II. A COMPLETE BAN ON FEDERALLY LICENSED VESSELS FROM NAVIGABLE WATERS FOR FIVE MONTHS OF EACH YEAR CONFLICTS WITH FEDERAL COASTWISE LAW.

Against this regulatory backdrop – with states and local governments aggressively regulating areas constitutionally reserved to the national government – the Ninth Circuit's approval of Hawaii's five-month total ban on Petitioners' federally-licensed vessels takes on added significance. The Ninth Circuit's decision, if left standing, will result in a hodgepodge of state and

federal regulations and a further balkanization of authority regulating and impacting interstate and international commerce. Additionally, this case presents the Court with an opportunity to clarify whether a state's total – but temporal – restriction of federally-licensed vessels from engaging in the only purpose for which they are useful is an impermissible local burden on interstate commerce.

The Ninth Circuit's decision was erroneous for at least three reasons. First, federally-licensed vessels enjoy "sweeping" rights to engage in coastwise trade, navigation, and commerce. *See, e.g., Young v. Coloma-Agaran*, 340 F.3d 1053, 1056 (9th Cir. 2003) ("The sweeping nature of the coasting license is premised on the idea that the right to engage in interstate commerce derives from the natural law and the Constitution confers *absolute* control of its regulation to congress.") (emphasis added) (citing *Gibbons*, 22 U.S. at 211). "The scope of the privilege granted by the federal licensing scheme has been well delineated . . . [a] state may not exclude from its waters a ship operating under a federal license." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960) (citation omitted). *See also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Hawaii's prohibition of federally-licensed vessels from operating in navigable waters off Maui undoubtedly interferes with Petitioners' right to engage in interstate commerce, navigation, and coastwise trade:

> Between December 15 and May 15 of each year, no person shall operate a thrill craft, or

> engage in parasailing, water sledding, or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing on the west and south shore of Maui as provided in section 200-38.

Haw. Rev. Stat. § 200-37(i) (Supp. 2007). *Accord* Haw. Admin. R. § 13-256-112. Furthermore, section 200-38 provides:

> Notwithstanding any other law to the contrary, no person shall operate a thrill craft, engage in parasailing, operate a motorized vessel towing a person engaged in parasailing, engage in commercial water sledding or commercial high speed boating, or operate a commercial motor vessel towing a person engaged in water sledding between December 15 and May 15 of each year in the waters of west and south Maui from Pu`u Ola`i to Hawea Point.

Haw. Rev. Stat. § 200-38(c) (1993).

Despite the total exclusion of Petitioners' federally-licensed vessels' unrestricted navigation, the Ninth Circuit held the regulations did not effect a "complete exclusion" of commerce because they did not prohibit protected navigation year-round. Under *Douglas*, states are limited in their ability to regulate commerce that is federally sanctioned via a coastwise license. *Douglas*, 431 U.S. at 277-285 ("States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures

otherwise within their police power.") (emphasis added). The Ninth Circuit overlooked the predicate question: Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (2000), does Hawaii even have the police power to regulate navigation? The Act limits the ability of the states to enact regulations which interfere with commerce, navigation, defense, and international affairs. While states were granted regulatory powers over the submerged lands, and waters above those lands from the coast line to three nautical miles seaward, the Act expressly provides that federal law regulating interstate commerce and navigation is "paramount" to any state's attempts to concurrently regulate these resources. The Act provides:

> The United States retains all its . . . powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, *all of which shall be paramount to*, but shall not be deemed to include, proprietary rights of ownership, or the rights of *management*, administration, leasing, use, and development of the lands and *natural resources* which are specifically recognized, confirmed, established, and vested in and assigned to the respective States. . . .

43 U.S.C. § 1314(a) (2000) (emphasis added). Thus, Hawaii has no "police power," as that term is used in *Douglas*, to adopt statutes affecting navigation.

Second, the Ninth Circuit's determination that the Constitution tolerates a complete exclusion of federal commerce for part of the year is contrary to the Fourth Circuit's holding in *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001), which found that Virginia's ban on the shipment of municipal solid waste was preempted by the coastwise license. *Id.* at 348.

Finally, the Ninth Circuit erroneously viewed the Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, § 213, 118 Stat. 2809 (2004), as Congress' attempt to moot all issues in this case, which it plainly did not do. That bill only purported to allow Hawaii's regulations to supersede federal laws "related to the conservation and management of marine mammals."[3] The bill did not purport to surrender *all* federal regulatory authority under the Submerged Lands Act or the federal coastwise law. Nonetheless, the Ninth Circuit interpreted the bill as an official

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[3] Section 213 of the 2005 Omnibus Appropriations Bill provides the following:

> Notwithstanding any other *federal law related to the conservation and management of marine mammals*, the State of Hawaii may enforce any state law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purposes of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

Fiscal Year 2005 Omnibus Appropriations Bill, Pub. L. No. 108-447, 118 Stat. 2809 (2004) (emphasis added).

declaration that Hawaii's parasailing ban did not interfere with federally-protected commerce.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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